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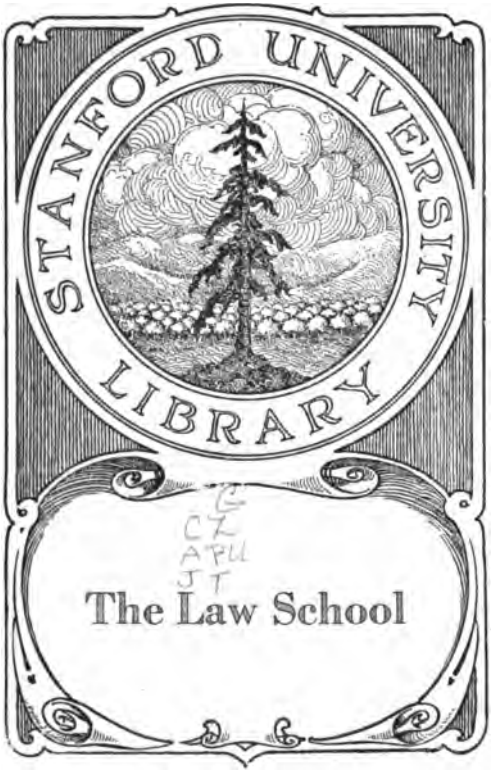

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The Law School

A

TREATISE

ON THE

LAW

OF

OBLIGATIONS,

OR

CONTRACTS.

By M. POTHIER.

TRANSLATED FROM THE FRENCH,
WITH AN INTRODUCTION, APPENDIX, AND NOTES,
ILLUSTRATIVE OF THE ENGLISH LAW ON THE SUBJECT.

By WILLIAM DAVID EVANS, Esq.
BARRISTER AT LAW.

IN TWO VOLUMES.

VOL. II.

LONDON:

PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY:
FOR JOSEPH BUTTERWORTH, LAW-BOOKSELLER, FLEET-STREET
AND J. COOKE, ORMOND-QUAY, DUBLIN.

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APPENDIX

TO

POTHIER ON OBLIGATIONS.

NUMBER I.

(Referred to, Vol. I. p. 28, 29.)

Of Illegality in Contracts.

IN adverting more particularly to contracts which are void as being illegal in their nature, I ſhall not at preſent dwell upon thoſe exceptions which are perſonal to the immediate parties to the contract, as being founded upon fraud, extortion, or any undue advantage taken by one party of the neceſſities of the other; but (diſmiſſing ſuch with the general remark, that the *Engliſh* courts of law and equity will, in every caſe attended with thoſe circumſtances, decide according to the great principles of univerſal juſtice,) ſhall proceed to ſome obſervations reſpecting contracts, the illegality of which is founded upon reaſons of public utility and moral rectitude. Wherever an engagement is entered into with a view to contravene the general policy of the law, no form of expreſſion can remove the ſubſtantial defect inherent in the nature of the tranſaction; the law will inveſtigate the real object of the contracting parties, and if that is repugnant to the principles eſtabliſhed for the general benefit of ſociety, it will vitiate the moſt regular inſtrument which ingenuity can contrive.

This ſubject was moſt ably diſcuſſed by Lord Ch. J. *Wilmot* in the caſe of *Collins* v. *Blantern*, 2 *Wilſ.* 347. A bond in the uſual form for payment of money was alleged to be given as an indemnity for a note entered into by the obligee for compounding a proſecution for perjury. In ſupport of the bond it was contended that no averment ſhould be admitted of its being given upon an illegal conſideration not appearing on the face of it. In the courſe of his judgment the Chief Juſtice uſed the following expreſſions: "The manner of the tranſaction was to gild over and conceal the truth, and whenever courts of law ſee ſuch attempts made to conceal

wicked deeds, they will bruſh away the cobweb varniſh and ſhew the tranſactions in their true light. This is a contract to tempt a man to tranſgreſs the law, to do that which is injurious to the community—it is void by the common law, and the reaſon why the common law ſays ſuch contracts are void is for the public good—you ſhall not ſtipulate for iniquity. All writers upon our law agree in this, no polluted hand ſhall touch the pure fountain of juſtice."—The whole of the judgment, from which theſe extracts are made, may be ſtrongly recommended to the peruſal of all who are engaged in juridical inquiries.

Many of the exceptions which fall within the ſcope of this diviſion are contrary to the immediate juſtice which would prevail in a moral view between the contracting parties; but the public tribunals will not afford judicial aſſiſtance to thoſe whoſe object is to infringe the general policy of the law, or to prejudice the rights and intereſts of others (*a*); and perhaps it is one of the greateſt ſecurities againſt tranſactions of this deſcription, that the contracting parties can have no redreſs againſt each other, and that where they are equally guilty of an infraction of the law, the claims of either may be effectually reſiſted.

Upon this ſubject it can hardly be neceſſary to ſtate, that tranſactions which have for their object the encouragement of manifeſt crimes, ſuch as murder, theft, perjury, and perſonal outrage, can never receive the ſanction of a court of judicature; and any engagement of a reward to abſtain from ſuch crimes is equally diſcountenanced, as it might effectively lead either to criminality or extortion.

(*a*) In the caſe of *Parſons* v. *Thompſon*, 1 *H. B.* 322., in which it was decided that an agreement by one perſon to pay a compenſation to another for retiring from a public office, provided the former was appointed to ſucceed him, was void; Lord *Loughborough* concluded his judgment as follows: "This agreement, reſting on private contract and honour, may perhaps be fit to be executed by the parties, but can only be enforced by conſiderations which apply to their feelings, and is not the ſubject of an action. The law encourages no man to be unfaithful to his promiſe; but legal obligations are, from their nature, more circumſcribed than moral duties."

In another caſe, where the party to a contract objected to it as being a fraud on the revenue, Lord *Mansfield* ſaid, the objection that a contract is immoral or illegal, as between plaintiff and defendant, ſounds at all times very ill in the mouth of the defendant. It is not for his ſake however that the objection is ever allowed; but it is founded on general principles of policy which the defendant has the advantage of, contrary to the real juſtice between him and the plaintiff, by accident, if I may ſo ſay. The principle of public policy is this; *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cauſe of action upon an *immoral* or *illegal* act. If from the plaintiff's own ſtating or otherwiſe, the cauſe of action appears to ariſe *ex turpi cauſa*, or the tranſgreſſion of a poſitive law of this country, there the Court ſays he has no right to be aſſiſted. It is upon that ground the Court goes, not for the ſake of the defendant, but becauſe they will not lend their aid to ſuch a plaintiff. So if the plaintiff and defendant were to change ſides, and the defendant was to bring his action againſt the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior eſt conditio defendentis.* *Holman* v. *Johnſon*, *Cowp.* 341.

There

There is a tradition that a ſuit was inſtituted by a highwayman againſt his companion to account for his ſhare of the plunder, and a copy of the proceedings has been publiſhed as found amongſt the papers of a deceaſed attorney. It was a bill in the Exchequer, which avoided ſtating in direct terms the criminality of the engagement, and is founded upon a ſuppoſed dealing as copartners in rings, watches, &c. but the mode of dealing may be manifeſtly inferred. The tradition receives ſome degree of authenticity, by the order of the court being ſuch as would in all probability enſue from ſuch an attempt. The order was, that the bill ſhould be diſmiſſed with coſts for impertinence, and the ſolicitor fined 50*l.* The printed account is accompanied by a memorandum which ſtates the particular times and places where the plaintiff and defendant were afterwards executed. *Europ. Mag.* 1787, vol. ii. p. 360. (*a*).

Contracts with a view to future proſtitution are illegal; but an engagement by way of reparation for paſt ſeduction will be ſupported, if it is not accompanied with any purpoſe of future cohabitation. Marchioneſs of *Annandale* v. *Harris*, 2 *P. Wms.* 339. Lady *Cox*'s caſe, 3 *P. Wms.* 339. *Walker* v. *Perkins*, 3 *Bur.* 1568. *Prieſt* v. *Parrott*, 2 *Veſ.* 160.

(*a*) *John Everet* againſt *Joſeph Williams*. The bill ſtated that the plaintiff was ſkilled in dealing in ſeveral commodities, ſuch as plate, rings, watches, &c. that the defendant applied to him to become a partner; that they entered into partnerſhip, and it was agreed that they ſhould equally provide all ſorts of neceſſaries, ſuch as horſes, ſaddles, bridles, and equally bear all expences on the roads, and at inns, taverns, or ale-houſes, or at markets or fairs. "And your orator and the ſaid *Joſeph Williams* proceeded jointly in the ſaid buſineſs with good ſucceſs on *Hounſlow-heath*, where they dealt with a gentleman for a gold watch, and afterwards the ſaid *Joſeph Williams* told your orator that *Finchley* in the county of *Middleſex* was a good and convenient place to deal in, and that commodities were very plenty at *Finchley* aforeſaid, and it would be almoſt all clear gain to them: that they went accordingly, and dealt with ſeveral gentlemen for divers watches, rings, ſwords, canes, hats, cloaks, horſes, bridles, ſaddles, and other things: that about a month afterwards the ſaid *Joſeph Williams* informed your orator that there was a gentleman at *Blackheath* who had a good horſe, ſaddle, bridle, watch, ſword, cane, and other things to diſpoſe of, which he believed might be had for little or no money: that they accordingly went and met with the ſaid gentleman, and after ſome ſmall diſcourſe they dealt for the ſaid horſe, &c. that your orator and the ſaid *Joſeph Williams* continued their joint dealings together until *Michaelmas*, and dealt together in ſeveral places, *viz.* at *Bagſhot* in *Surry*, *Saliſbury* in *Wiltſhire*, *Hampſtead* in *Middleſex*, and elſewhere to the amount of 2000*l.* and upwards."—The reſt of the bill is in the ordinary form for a partnerſhip account. 3d *October* 1725, on the motion of Serjeant *Girdler* the bill referred for ſcandal and impertinence. 29th *November*, Report of the bill as ſcandalous and impertinent confirmed; and order to attach *White* and *Wreathcock* the ſolicitors. 6th *December*, The ſolicitors brought into court and fined 10*l.* each; and ordered that *Jonathan Collins* Eſq. the counſel who ſigned the bill, ſhould pay the coſts. The plaintiff was executed at *Tyburn* in 1730, the defendant at *Maidſtone* in 1735. *Wreathcock* the ſolicitor was convicted of robbing Dr. *Lancaſter*, in 1735, but reprieved and tranſported. Lord *Kenyon* in the caſe of *Riddley* v. *Moore*, Appendix to *Clifford's Report* of *Southwark* Election, has referred to this caſe. But, upon examining the office, the account is not ſupported. Taking the caſe as a ſuppoſitious one it ſufficiently illuſtrates the general principle.

Every tranſaction the object of which is the violation of a public or private duty, is alſo void; ſuch are bribes for appointing to offices of truſt, private engagements that an office ſhall be held in truſt for a perſon by whoſe intereſt it was procured, agreements to ſtifle a proſecution for any crime of a public nature, bonds to recompenſe the procuring a marriage (*a*). See *Parſons* v. *Thompſon*, 2 *H. B.* 322.; *Garforth* v. *Fearon*, *id.* 327.; *Blachford* v. *Preſton*, 8 *T. R.* 89.; *Collins* v. *Blantern*, 2 *Wilſ.* 347.

A perſon who contracted to keep horſes for government, agreed with another who was under contract to ſupply him with forage, to commute a part of the forage for money; this was holden to be void as a fraud upon the public. *Wallis* v. *Baldwin*, *Doug.* 450.

For the ſame reaſon the law will not ſupport a promiſe to indemnify an officer for acting contrary to his duty, or in ſhort any other engagement which falls within the ſcope of the general principle.

Upon the examination of a bankrupt reſpecting particular ſums which he was charged with, having received, a perſon promiſed that if the aſſignees would forbear to proceed in having that examination taken, he would pay a ſum of money for the benefit of the eſtate. This promiſe was ruled to be void, as it was the intention of the legiſlature that the creditors ſhould have the full examination of the bankrupt, as to the ſtate of his effects and the diſpoſition of them, and the promiſe was to induce the aſſignees and commiſſioners to forbear doing their duty. *Nerot* v. *Wallace*, 3 *T. R.* 17.

An intention to defraud the public revenue is a frequent cauſe of vitiating contracts; but the law of one country does not interpoſe to protect the revenue of another; and therefore an engagement, valid in other reſpects, is not defeated by any contrivance to evade the revenue laws or ſpecial commercial regulations of a foreign country (*b*).

And even where goods were purchaſed abroad with an intention by the buyer to ſmuggle them into *England*; it was held that an action might be maintained for the price, although the ſeller was acquainted

(*a*) The caſes reſpecting marriage-brokage are collected in Mr. *Fonblanque*'s notes to the *Treatiſe of Equity*, book i. ch. iv. ſ. 10. See alſo the caſes of *Scribblehill* v. *Brett*, in the laſt edition of *Brown's Parl. Caſes*, iv. 144.; *Booth* v. *Warrington* (E) ib. iv. 163. and *Muriſone* v. *Arubthnot* (Viſc.) ibid. viii. 247. Appendix II.

(*b*) *Pothier* in his treatiſe on Inſurance makes ſome obſervations in oppoſition to this principle, which are apparently very judicious. Having cited a judgment from *Valin*, in which it was held that, it was not forbidden to a *Frenchman* to carry on in a foreign country, a commerce prohibited by the laws of ſuch country, and that therefore the riſk of confiſcation might be inſured like other perils of the ſea; he obſerves that this principle appears falſe; for that thoſe who carry on commerce in any country, are obliged by the law of nations, and alſo by the law of nature, to conform, in reſpect to ſuch commerce, to the laws of the country where they carry it on. Every ſovereign has empire and juriſdiction over whatever

acquainted at the time with the illegal intention of the purchaſer. But it was ſaid that if the ſeller had any concern in running the goods into *England*, he would have been an offender againſt the laws of this country. *Holman* v. *Johnſon*, *Cowp.* 341. (*a*).

It is clearly ſettled that if any engagement is entered into for giving a fortune preparatory to an intended marriage, no private tranſaction to defeat the effect of it can prevail even as between the immediate parties. Were it otherwiſe there would be a conſtant opportunity of deluſion, and conſents to marriage might be obtained under the fallacious appearance of property which in fact did not exiſt.

The creditors of an inſolvent perſon having agreed to accept a compoſition of their debts, one creditor refuſed to ſign the deed of compoſition without having a note for the remainder of his debt, and the note was held to be void as being a fraud upon all the other creditors; for it prevented the debtor's being put in that ſituation which was the inducement to them to ſign the deed and relinquiſh a part of their demands. *Cockſhott* v. *Bennet*, 2 *T. R.* 763. And upon the ſame principle, where a perſon who could not raiſe money to purchaſe the goods in a houſe which he had taken, prevailed upon a friend to give for them what was repreſented to be the full price; but a promiſſory note was privately given for a further ſum; this was held to be a groſs fraud upon the perſon who was induced to advance his money under the ſuppoſition that it was the complete purchaſe money for the goods, and the note was therefore adjudged to be void. *Jackſon* v. *Durham*, 3 *T. R.* 551. But where a compoſition was agreed to be taken by inſtalments, the inſiſting upon an additional ſecurity for the payment of thoſe inſtalments was not deemed fraudulent, as there was no intention of exacting any greater ſatisfaction than was generally agreed upon. *Fieſe* v. *Ran-*

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ever is done in the country where he has a right to command, and conſequently he has a right to make laws reſpecting the commerce that takes place in his country, which ſhall be obligatory upon foreigners as well as upon his own ſubjects. It cannot be diſputed that a ſovereign has a right to retain in his territories certain merchandizes which are there, and to prohibit their exportation. To export them then without his orders, is to infringe his right of retaining them, and is conſequently an injuſtice.

(*a*) See the extract from Lord *Mansfield*'s opinion in this caſe, *ante*, p. 2. *n.* (*a*). See alſo the caſe of *Biggs* v. *Lawrence*, 3 *T. R.* 454. in which it was held, that no action could be maintained by four partners, three of whom lived in *England* and the other in *Guernſey*, upon a ſale of goods made by the latter, and ſhipped in a manner adapted for ſmuggling. It has been ſince held, that even a foreigner could not recover in our courts the price of goods ſold with a knowledge that they were intended to be ſmuggled into this country, and packed by him in a particular manner for that purpoſe. *Waymell* v. *Reed*, 5 *T. R.* 599. See alſo the caſe of *Lightfoot* v. *Tenant*, 1 *Boſ. & Pull.* 551. in which it was held to be a good plea in an action upon a bond, that it was given by the defendant to the plaintiff for the price of goods ſold by the latter to the former, to be by him ſhipped in *London* for *Oſtend*, to be there ſhipped for the *Eaſt Indies*, in which caſe Lord Ch. Juſtice *Eyre* conſidered with ſome particularity the degree of participation by the ſeller in the illegal conduct of the buyer, which might affect the validity of the contract.

dall, 6 *T. R.* 146. But ſee the caſe of *Leiceſter* v. *Roſe*, 4. *Eaſt.* 172. In which (ſubſequent to this work going to the preſs), the obtaining ſuch an additional ſecurity was under the circumſtances ruled to be fraudulent, and the ſecurity conſequently adjudged to be void.

Puffing at auctions is a fraud upon the purchaſers, and therefore a perſon cannot have any legal aſſiſtance in recovering a ſatisfaction for his attendance for that purpoſe. *Treatiſe of Equity*, 24. and ſee *Walker* v. *Nightingale*, *Bro. Parl. Ca.* iv. 193. And it was held upon very full conſideration that a perſon who employed an auctioneer could not maintain an action againſt him for ſelling the property under a certain price (the argument, taking the intention that there ſhould be a private bidder forgranted). *Bexwell* v. *Chriſtie*, *Cowp.* 395.

An engagement founded upon the oppreſſion of a third perſon is equally deſtitute of legal efficacy, as if founded upon fraud. Such was the caſe where a ſheriff's officer received a ſum of money from a defendant for admitting him to bail, and agreed to pay the bail part of the money which was ſo exacted. *Sloteſbury* v. *Smith*, 2 *Bur.* 924.

As the public are intereſted in the freedom of trade, any agreement for the unlimited reſtraint of a perſon in following his lawful occupation is utterly void; but an agreement not to follow an occupation within particular limits may be good, provided it is founded upon an adequate conſideration. In a recent caſe it was decided that taking a perſon as an aſſiſtant in the buſineſs as a ſurgeon was a ſufficient conſideration for a bond not to exerciſe the ſame profeſſion afterwards within a certain diſtance of the employer's place of reſidence. *Davis* v. *Maſon*, 5 *T. R.* 118. It is the policy of the law to repreſs agreements in reſtraint of marriage; therefore a bond from a woman to a man to pay a ſum of money if ſhe married any other perſon was holden to be void, being eſſentially different from the legal contract of mutual promiſes to marry. *Low* v. *Peers*, 4 *Bur.* 2224.

Without entering into a more particular enumeration of the ſeveral grounds which affect the validity of contracts, whether by virtue of the general principles of rectitude, or by the particular policy and inſtitutions of our own country (*a*), it will be proper to keep it in view as a leading propoſition, that an illegality in the object of a contract will fruſtrate the ſtricteſt regularity in form and expreſſion. A ſale at an exorbitant price of ſome article of trifling value is a common cover to a bribe. A wager is alſo frequently

(*a*) Mr. *Fonblanque* gives an accurate ſummary of the law upon this ſubject, when he obſerves that conſiderations againſt the policy of the common law, or againſt the proviſions of a ſtatute, or againſt the policy of juſtice, or the rules and claims of decency, or the dictates of morality, are void in law and equity. *Treatiſe of Equity*, b. 1, c. 4. ſ. 4.

the

the diſguiſe of an illegal tranſaction. But theſe contrivances are totally inefficacious, when the real intention can be ſufficiently detected. Indeed wagers are void if they are of ſuch a nature that they might have an illegal tendency, although they are not accompanied by an illegal intention in the particular inſtance; as a wager between two voters reſpecting the event of an election. *Allen* v. *Hearn*, 1 *T. R.* 56. and a contrary determination would be in effect a general protection to illicit tranſactions.

Where money has been paid on account of an illegal contract, *e. g.* procuring a place in the cuſtoms, the performance of which is incomplete, as for procuring an office, it has been held that the party might reſcind the contract and recover back the money before the office was procured. *Walker* v. *Chapman*, cited *Doug.* 471. (*a*). And where a wager was laid upon an illegal ſubject, as a boxing match, it was decided that either of the parties might maintain an action for the money which he had depoſited, before the wager was decided. *Cotton* v. *Thurland*, 5 *T. R.* 405.

And in a recent caſe it is ſtated as a determination of the Court of King's Bench, that a perſon who had loſt an illegal wager might recover back his depoſit. The Court are repreſented to have ſaid that it was more conſonant to the principles of ſound policy and juſtice, that wherever money had been paid on an illegal conſideration, it might be recovered back again by the party who improperly paid it, than by denying the remedy to give effect to the illegal contract, *Lacauſſade* v. *White*, 7 *Term Reports*, 535. But there is evidently a miſtake in the report of that caſe; for the plaintiff *was in fact* the winner of the wager, which related to a ſubject of public notoriety, the ceſſation of hoſtilities between *England* and *France*. And the primary object of the action was to recover the money which had been loſt by that event not having taken place. The principal ground upon which the wager was held to be invalid, muſt (ſo long as wagers in general are conſidered as obligatory contracts,) be conſidered as poſſeſſing the character, rather of ſcholaſtic ſubtlety, than of juridical reaſon. It is, that a perſon by laying a wager on the event of peace or war, has a private intereſt which may affect his wiſhes in a manner repugnant to his public duty.

Where a contract is connected with circumſtances of an illegal or immoral nature, or where there are two contracts having a connection or affinity, the one of which is affected by circumſtances of

(*a*) In an eſſay on the action for money had and received I have ventured to queſtion the propriety of this deciſion. It is eſſentially different from that which follows; for in the one the parties were perſonally engaged in a direct infraction of the law; in the other they had merely entered into an engagement deſtitute of legal efficacy, but not attended with any perſonal turpitude or criminality.

illegality; the influence of such circumstances upon the contract with which they are incidentally connected, is often a question of considerable nicety, and the cases which have occurred upon this subject, do not enable me to state with confidence any leading principle which can be resorted to in the exposition of it. That a participation in carrying the illegal purpose into effect, vitiates every contract, whether primary or secondary, of which it constitutes the object, is a point upon which no difference of opinion can be entertained, but what shall be deemed a participation, is often in itself a question by no means easy to resolve. And certainly there are many cases in which a reference to an illegal subject, without any participation in it, will be fatal to a contract.

Where a person is guilty of trading in contravention of the law, the insurance upon such trade is so immediately connected with the illegal object as to be necessarily involved in the illegality, as is manifest from daily experience.

It is however astonishing to see how often this exception is taken advantage of by persons affecting fairness of reputation. There is no case to which the preceding general observation, of being "contrary to the immediate justice which would prevail in a moral point of view between the contracting parties," can more directly or immediately apply. Stock-jobbing, though prohibited and discountenanced by law, is extensively carried on, and a person would be held to act dishonorably who availed himself of the legal exception. A bet of 50*l.* at cards is paid, or the refusal to pay it is esteemed disgraceful. But an underwriter says, I have taken a premium to insure against a contingent loss, the loss has happened but some rule of legal policy enables me to evade my contract, though all the circumstances were known to me at the time of making it; I will therefore take advantage of the law, and refuse to execute my deliberate engagement, and at the same time I will keep the money which I received for entering into it. Such is the conduct daily presented to the public in the defences against contracts of insurance; and which, from its frequency, appears to pass current and without reproach.

But where two persons are engaged in a boxing match, and two others, perfectly unconnected with them, make a bet upon the event, that is also void, although it cannot have any tendency to promote the illegal act which is the subject of it. The law is the same if two persons bet upon the event of any illegal game in which others may be engaged; but as wagers, though admitted to be legal in general, are very much discountenanced, the cases decided respecting them will not always furnish a ground of analogy for the exposition of other subjects.

Where

Where two perſons jointly engaged in an illegal ſtock-jobbing tranſaction with a third, and a loſs having ariſen, one of them paid the whole, and took the bond of the other for his proportion, the bond was decided to be good, for as between the two it was regarded as a mere loan of money, the lender of which was not concerned in the uſe made of it by the borrower, *Faikney* v. *Renous*, 4 *Bur.* 2069.; and in a ſubſequent caſe, where one of the partners, under ſimilar circumſtances, had paid the money with the conſent, authority, and knowledge of the other, the majority of the court of *King's Bench*, contrary to the opinion of the chief juſtice, decided that an action might be maintained for a proportionate ſhare: but without ſuch conſent it was agreed that it could not; for, in conſequence of the illegality of the tranſaction, there was no obligation to pay the money to the party with whom the contract was made. *Petrie* v. *Hannay*, 3 *Term Reports*, 418.

"(*a*) Subſequent to this, one *Wilſon* was employed by *Leſhley*, as a ſtock-broker, in a ſimilar tranſaction, and having paid money for the differences, there was a diſpute reſpecting the amount. This diſpute was referred to *Steers* and others, who awarded a certain ſum to be due; for part of which *Wilſon* drew a bill upon *Leſhley*, and after it was accepted, indorſed it over to *Steers*; and it was decided that *Steers* was not entitled to recover againſt *Leſhley* on his acceptance. Lord *Kenyon* ſaid, that if he had lent the money to *Leſhley* to pay the differences, and had afterwards received the bill in queſtion for that ſum; then, according to the principle eſtabliſhed in the preceding caſe, he might have recovered. But here the bill on which the action was brought, was given for thoſe very differences, and therefore *Wilſon* himſelf could not have enforced the payment of it; and as *Steers* knew of the illegality of the contract between *Wilſon* and *Leſhley*, he could not be permitted to recover on the bill in a court of law. Two of the judges were abſent when this deciſion was made, and Mr. Juſtice *Aſhhurſt* does not appear to have expreſſed any opinion upon the ſubject,—6 *Term Reports* 61. This deciſion does not ſeem to be founded upon very ſatisfactory reaſons: in the firſt place, it may be incidentally obſerved, that the award had created a new original duty, and could not, any more than a judgment, be impeached on account of the circumſtances to which it related, furniſhing no ground of action; and therefore *Leſhley* was, at the time of accepting the bill, debtor, not upon the original conſideration, but upon the award. I however do not mean to dwell upon this circumſtance; becauſe the point was not made, and poſſibly what is called an award may have been merely the adjuſt-

(*a*) I have already publiſhed the paſſages between the inverted commas in an eſſay on bills of exchange.

ment

ment of differences. But ſuppoſing the award out of the caſe; it is agreed that if *Steers* had lent the money to *Leſhley* for the payment of *Wilſon*, it would have been a good ground of action: but in neither of the preceding caſes was the money paid into the hands of the defendant; it was paid by his conſent to the party entitled to the balance, (the illegality being waived,) which was regarded as amounting to an immediate loan. But ſurely the advancing money to *Wilſon* upon *Leſhley*'s acceptance, was at leaſt equivalent to that. If *Leſhley* had had a partner who drew the bill in favour of *Wilſon*, and paid him the amount, the bill being accepted by *Leſhley*, which teſtified his requeſt for the payment, ſuch partner would have been entitled to recover under the immediate and expreſs authority of the caſe againſt *Hannay*. Whatever inference might be drawn from notice of the tranſaction, would apply moſt directly and pointedly between thoſe who immediately participated in it; and whatever diſtinction can be made, muſt be in favour of the perſon receiving ſuch a bill for a valuable conſideration, and no wiſe implicated in the illegal circumſtances in reſpect of which the queſtion aroſe. It was fairly argued at the bar, that the bill was good in the hands of the broker, for it certainly was an avowal of the money being paid by him at the requeſt of the defendant; which brings the caſe within the broad principle of the deciſion in *Faikney* and *Renous*.

"In a ſubſequent caſe, the Court acting upon the authority of the caſe of *Steers* and *Leſhley*, refuſed a rule to ſhew cauſe in favour of the indorſee of a promiſſory note, given upon a ſettlement of differences; but the general argument was not entered into. *Brown* v. *Turner*, 7 *Term Reports* 630. If the obſervations ſuggeſted reſpecting the caſe of *Leſhley* and *Steers* are correct, and the diſcuſſion of the ſubject is not precluded by the authority of theſe adjudications; the laſt caſe, as it depends ſolely upon the preceding, cannot materially vary the courſe of reaſoning upon the general propoſition.

"In a caſe in Chancery before Lord *Loughborough*, his Lordſhip held, that a perſon was not bound by his acceptance of a bill for money laid out on his behalf in effecting a void inſurance upon an *Eaſt India* voyage; and referring to the caſes of *Faikney* v. *Renous*, and *Petrie* v. *Hannay*, ſaid he was aware of thoſe caſes, but could not perfectly accede to them. What was called conſent in thoſe caſes, was a confederacy to break a poſitive law, *ex parte Mather*, 3 *Veſ.* 373. But with every reſpect to the great authorities who have diſſented from the principle of thoſe caſes, that principle ſeems to be ſupported upon the ſtrongeſt foundations of juſtice. Where parties agree to contravene a legal prohibition, it is a neceſſary conſequence

ſequence that from ſuch agreement no legal obligation can ariſe; but where the act is not in itſelf criminal, there is an honorary obligation which the party is at liberty to fulfil, and againſt the voluntary performance of which there can be no exception. If then, admitting the force of the obligation, he evinces a diſpoſition to perform it, but for his own convenience perſuades another to advance the money on his behalf, it is to every ſubſtantial purpoſe, as much a loan of that money to himſelf, as if the money had been actually counted out to him, and he had paid it over. Having thus induced another to make an advance on his behalf, there is no more juſtice in permitting him afterwards to impeach that act, than if money had been advanced by his requeſt to a perſon whom he wiſhed to aſſiſt, but to whom he was under no obligation, either legal or honorary; and there is nothing in the policy of the law to relieve him from the undertaking to repay the money ſo advanced, when by the advancing it, no illegal object was intended to be promoted. The different illuſtrations of Lord *Mansfield* in *Faikney* and *Renous*, all proceed upon the principle of a loan of money, upon which the lender is not to be affected by the borrower's application.

"It has been decided at *Niſi Prius*, that a perſon, who at the requeſt of a holder of a bill, has put his name upon it, and thereby been obliged to pay the contents to a *bona fide* holder, may recover the money paid, in an action on the bill, from any perſon whoſe name is on it, although he knew it was given on an illegal conſideration. *Peake* 215, *Chitty* 53".

In the caſe of *Holman* v. *Johnſon*, which has been already twice referred to in the diſcuſſion of the preſent ſubject, the knowledge by the ſeller of the goods that an illegal uſe was intended to be made of them by the buyer, did not defeat his action for the price, as he had not any participation in the ſubſequent illegality; and it is perfectly familiar, that although the legiſlature has vacated ſecurities for money lent to play with, the loan of the money is itſelf a valid contract. It will be difficult to find a ſatisfactory principle for the diſtinction, that money lent to a perſon to enable him to accompliſh a future illegal purpoſe, ſhall create a valid obligation; but that money lent to him, or what is preciſely the ſame thing for every rational purpoſe, money paid by his deſire and upon his authority in order to ſatisfy an illegal contract already executed, ſhould not; and that, after having prevailed upon another to advance his money in a manner by which no proſpective illegal purpoſe could be facilitated, he ſhould be encouraged to ſet up his own previous illegal conduct as a bar to the repayment of it.

It has been held, that letting lodgings to a perſon who had no other reſource for payment than money acquired by proſtitution, was invalid; and that no action could be maintained for the rent: but where it was ſet up as a defence to an action for waſhing cloaths, that ſome of the cloaths were for the purpoſe of enabling the defendant, who lived in a ſtate of proſtitution, to appear at public places, and that the others were night cloaths for the uſe of gentlemen who might viſit her; it was held that the action might be maintained. Mr. Juſtice *Buller* obſerved, that the plaintiff was employed to waſh the defendant's linen, and the uſe which the defendant made of it could not affect the contract. And ſpeaking of one of the former caſes reſpecting lodgings, he ſaid he ſuppoſed the lodgings were hired for the expreſs purpoſe of enabling the perſons to meet there; which would certainly be unlawful. See *Lloyd* v. *Johnſon*, 1 *Boſ.* & *Pull.* 340. But if the purpoſe ſo referred to was merely a purpoſe perſonal to the defendant, if the plaintiff was to have no concurrence in promoting it, if his compenſation was not made conditional upon the ſucceſs of it, (the probability of not being able otherwiſe to obtain payment, is quite a different thing from ſuch a condition,) it will not be eaſy to diſtinguiſh the caſe of the lodgings from that of the cloaths, or from the ſale of the tea in the caſe of *Holman* v. *Johnſon*. The contract of ſale, the work and labour, the occupation, are all perfect, independant, and complete; the illegality in the ſubſequent uſe is contingent and accidental. To induce a conſiſtency of principle, the knowledge or the expectation that ſuch ſubſequent uſe was intended by one party, ſhould be univerſally allowed or univerſally diſallowed as a bar to the rights, which the other would be legally entitled to upon the original contract if no ſuch intention had exiſted. It never has been decided, and probably never will be, that if a perſon living with another in a ſtate of concubinage hires a houſe for their common reſidence, the landlord, however clearly apprized of their ſituation, is without a remedy for his rent; but ſuch a ſtate of concubinage is not leſs repugnant to the principles of the law than a ſtate of proſtitution.

The following obſervations, which I have already publiſhed in an Eſſay on the Law of Inſurances, are materially connected with the preſent ſubject.

"The general right of entering into any legal contract is reſtrained by a ſtatute, which ſecures to the two companies of the *London* Aſſurance and the *Royal Exchange* Aſſurance, the excluſive right of inſuring by a common fund; and all other inſurances in co-partnerſhip are declared to be void, and all ſums underwritten thereon, are to be forfeited, half to the king, and half to the informer. 6 *Geo.* 3. c. 18.

c. 18. A ſum of money was paid to government for the benefit of this monopoly, the profeſſed purpoſe of which was the ſtability of the ſecurity.

"All the deciſions upon the conſtruction of this ſtatute are of a very modern date. The points which they have eſtabliſhed are, that where a partnerſhip is entered into in contravention of the prohibition that it contains, one of the partners has no claim upon the other for a proportion of the loſſes which he has paid. *Mitchell* v. *Cockburn*, 2 *H. B.* 379. where three perſons were engaged as partners, and the policies were in the name of one ofthem, and another, together with a partner of his own, (to which partnerſhip there is no legal objection,) were the brokers; the aſſignees of the perſon whoſe name was uſed were not allowed to recover from the brokers the premiums received. *Booth* v. *Hodgſon*, 6. *T. R.* 405. It had previouſly to theſe caſes been held by Lord *Kenyon* at *Niſi Prius*, that an underwriter who had paid a loſs, could not recover from a broker the money which the broker had received from another perſon, who had agreed to take half the plaintiff's riſk; his Lordſhip ſaying, that a party could not appeal to a court of juſtice to enforce a contract founded in a breach of the law. *Sullivan* v. *Greaves*, *Park* 8. But it has been ſince ruled by the Court of Common Pleas, that a broker to whom the underwriter had paid the loſs on an illegal policy could not reſiſt paying it over to the aſſured; and they even refuſed to grant a rule to ſhew cauſe why there ſhould not be a new trial. Mr. Juſtice *Buller* ſaid, "Is the man who has paid over money to another's uſe, to diſpute the legality of the original conſideration? Having once waived the illegality, the money can never come back to his hands again. Can the defendant then, in conſcience, keep the money ſo paid? For what purpoſe ſhould he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?" Lord Chief Juſtice *Eyre* ſaid, "The queſtion is, whether he who has received money to another's uſe on an illegal contract can be allowed to retain it, and that not even at the deſire of thoſe who paid it to him? I think he cannot." *Tenant* v. *Elliot*, 1 *B.* & *P.* 3. This deciſion certainly cannot in principle be reconciled with that before Lord *Kenyon*; and it cannot require much argument to ſhew that it is more conſonant to the ſubſtantial principles of juſtice, and ſo connected with them, that nothing but the moſt authoritative proviſions of the law ſhould be ſufficient to induce an oppoſite concluſion. The perſon who is intereſted in conteſting the legality of a contract, waives the exception, and tranſmits the money which he has engaged to pay, and which he was under an honorary obligation to pay, by the hands of a third perſon, as he might have tranſmitted a mere donation; and

and the queſtion is, whether a man who is only the inſtrument of ſuch tranſmiſſion ſhall be allowed to intercept the money in its courſe, and appropriate it to himſelf? The ſtatement of ſuch a queſtion would ſeem ſufficient to decide it. Even the caſe of *Booth* and *Hodgſon*, in ſome degree, ſeems to be founded upon diſputable reaſoning. There were in that caſe, in truth, three contracts, or ſets of contracts: 1ſt. The partnerſhip for inſurance, which was confeſſedly illegal: 2d. The contracts of inſurance, which as between the plaintiff, the inſurer, and the aſſured, were legal and obligatory, and in reſpect of which there was no diſpute; and, 3d. The contract of ſervice or commiſſion between the inſurer and the broker. When the broker, in purſuance of the laſt of theſe three contracts, had received money for the uſe of the inſurer upon the ſecond, it would have been very iniquitous to have retained that money upon the allegation, that the inſurer had entered into the firſt contract reſpecting the ſubject matter with his partner, and which could not be enforced as between themſelves; the inſurer would ſingly have been liable to every loſs, and would ſingly have had a right of action againſt the inſured for the premiums. No contribution could have been claimed on either ſide; then the broker muſt either retain the money himſelf, or he muſt pay it to the inſurer whoſe name was uſed, or to the inſurer and his partners jointly. Againſt the firſt there ſhould be every leaning and preſumption, as much as in the caſe laſt diſcuſſed; and this, whether there was a broker merely engaged as ſuch, or two brokers in copartnerſhip; one of whom was a member of the illegal partnerſhip of inſurance. The legal prohibition ſeems to attach upon the third caſe, leaving the ſecond, in which the benefit would accrue to the party who had ſubjected himſelf to all the legal claims of the ſeveral perſons aſſured. Theſe ſuggeſtions, however, are by no means offered with the ſame degree of confidence as the objection to the broker being permitted to retain from one partner what he had actually received in execution of the engagement of the other.

"In a caſe before the Common Pleas, ſubſequent to thoſe which are included in the preceding diſcuſſion, and which was not under my notice in the courſe of it, it appeared that the plaintiff had ſent by the defendant, who was a carrier, to a third perſon, large quantities of counterfeited halfpence; the perſon to whom it was ſent paid the defendant the money for which he had agreed to purchaſe it of the plaintiff, and the object of the action was to recover the money ſo paid. The evidence left it doubtful whether the defendant was or was not privy to the nature of the tranſaction at the time when it occurred. In caſe ſuch privity had appeared, Lord Chief

Chief Juſtice *Eyre* intimated his opinion, that a demand neceſſarily ariſing out of an illegal contract, and tending to facilitate the execution of it, would be vitiated by that contract. But ſuppoſing that not to be the fact, his Lordſhip obſerved, after referring to the preceding caſe of *Tenant* and *Elliott*, (in which the broker was not allowed to retain the money paid to him by the underwriter, on behalf of the aſſured, upon an illegal inſurance,) that the caſe was brought to this, that the money was got into the hands of a man who was not a party to the contract, who had no pretence to retain it, and to whom the law could not give it, by reſcinding the contract. Though the Court would not ſuffer a party to demand a ſum of money in order to fulfil an illegal contract, yet there was no reaſon why the money in that caſe ſhould not be recovered, notwithſtanding the original contract was void. Mr. Juſtice *Buller* was of opinion, that if the knowledge and participation had been made out, it would not have made any difference in that action, which was not founded upon the illegal contract, but on a ground totally diſtinct from it, and that, the defendant having received the money for the uſe of the plaintiff, it was immaterial whether the money was paid on a legal or on an illegal contract. He referred to the caſe of *Faikney* and *Renous*, and to a caſe of money lent to pay a bet at a horſe-race. Mr. Juſtice *Heath* expreſſed himſelf of the ſame opinion. He ſaid, he looked upon the matter in the ſame light as if the money had been paid into the hands of a banker, who could never be allowed to ſay that it was paid in on an illegal conſideration; and he conſidered the caſe where a party was allowed to recover money lent to game withal as very ſtrong. Mr. Juſtice *Rooke* enlarged very much upon the contrary opinion. The general effect of his obſervations is included in the propoſition, "That a man who had been guilty of an indictable offence ought not to have the aſſiſtance of the law to recover the profits of his crime, and that whether his agents were innocent or criminal, privy or not privy, his claim againſt thoſe agents was equally inadmiſſible in a court of law." The caſe was referred to a new trial, principally on account of the uncertainty of the fact, and the defendant afterwards paid the money. *Farmer* v. *Ruſſel*, 1 *B.* & *P.* 296."

Retaining the ſentiments which I have already ſubmitted to the public, in the paſſage cited from the Eſſay on the Law of Inſurance, the impreſſions of my mind ſtrongly coincide with the doctrine of Mr. Juſtice *Buller* and Mr. Juſtice *Heath*. If *Gaius* lends *Titius* a ſum of money, nobody will contend that *Titius* has a right to withhold the payment by impeaching the legality of the mode

in

in which *Gaius* acquired it (*a*), any more than a tenant can impeach the title of his landlord, by saying that the eſtate was the reward of an illegal action. And when a third perſon pays money to *Titius* as the money of *Gaius*, and with the intent of delivering it to *Gaius*, it is immaterial to *Titius* what was the nature of the motive for which the money was ſo given, whether an obligatory contract, a void contract, an illegal contract, or a gratuitous donation. The money has, to all ſubſtantial purpoſes, as much become the immediate property of the perſon for whom the payment was intended, as if it had gone through the circuitous courſe of being paid to himſelf and afterwards lent to another. The juſtice of the caſe as between the parties is too plain to admit of any argument, and the intereſt of the public ſeems to be ſufficiently protected by withholding the remedies of the law in reſpect to the immediate ſubject which is a contravention of its authority, without purſuing that ſubject in its remote conſequences and incidental effects.

The legiſlature having prohibited giving entertainments to electors after the teſte of a writ for the election of members of parliament, it was ruled in the caſe of *Ribbans* v. *Crickett*, 1 *B.* & *P.* 264. that an innkeeper could not recover the price of victuals furniſhed contrary to that prohibition. Suppoſing the innkeeper to have been inſtructed generally to furniſh entertainments prohibited by the act, the caſe falls within the common principle of an illegal participation. But if an entertainment was given to particular deſignated perſons, the queſtion might ariſe how far the knowledge that ſuch perſons were of the prohibited deſcription would affect the right to recover. The diſtinction between the two caſes would certainly be very minute; but that muſt always be the caſe between the extreme points of legal and illegal contracts, wherever ſuch extremes may happen to be. And I cannot but think that the principles which prevailed (and, if the opinion I have endeavoured to ſupport is correct, wiſely and juſtly prevailed,) in the caſe of *Faikney* and *Reynous*, would ſupport the demand; that it would be held that the innkeeper furniſhed the entertainment perſonally to the party ordering it, and that he was not concerned to examine the manner in which it was diſtributed.

Subſequent to the completion of this diſcuſſion, the caſe of *Edgar* v. *Fowler*, has been decided, in which it was held that a

(*a*) In the caſe of *Bird* v. *Appleton*, 8 *T. R.* 562. the underwriters upon goods from *Canton* to *Hamburgh* contended that they were not liable for a loſs, becauſe the goods were purchaſed at *Canton* with the proceeds of a cargo brought there contrary to the *Engliſh* navigation laws; but the defence was not allowed. Mr. Juſtice *Lawrence* ſaid, We cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchaſe of goods; if the money were obtained by robbery on the highway, and laid out in the purchaſe of a cargo, I do not know why the cargo may not be legally inſured.

broker who had effected a reinſurance, (a contract which the legiſlature for ſome reaſon, or for none, has been pleaſed to render invalid) and credited the inſurer and debited the aſſured with the premium, was not ſubject to an action by the former for the amount, as that would be giving effect to the illegal contract. 3 *Eaſt.* 222. It does not ſeem to have been diſtinctly agreed what would have been the opinion of the court, if the premium had been actually paid; but it does not occur to me, that any difference could properly ariſe from that circumſtance, as the plaintiff was authorized by the defendant to conſider it as paid: and from what fell from the court, it ſeems probable that they would not have thought the aſſured, (in conſequence of a notice from whom the broker had refuſed to pay) any better intitled to recover. It is obvious that the principle adopted in this caſe is oppoſite to that which I have endeavoured to ſupport. It ſeems to be no leſs oppoſite to that of ſome of the caſes which I have cited. Admitting the deference which to a certain extent is due to authority, and aware of the liability to prejudice in favour of an opinion, not the effect of momentary impreſſion but of long and repeated conſideration; I muſt acknowledge myſelf unable to reconcile the converſe of that opinion in the preſent inſtance, to my ideas of the true principles of judicial propriety. I ſtill adhere to the opinion, that the authority of the legiſlature is ſufficiently ſupported by denying a legal efficacy to the contract, without empowering the hand, which is only an inſtrument of tranſmiſſion, to retain from the party who has made an engagement nowiſe criminal, inducing an honorary obligation, though deſtitute of legal efficacy, that conſideration which the party, ſtipulating for the benefit of ſuch obligation, has conſented to pay. It is not probable that my private ſentiments will in practice be oppoſed to a judicial opinion of the court of King's Bench, but the object of my enquiries calls not only for a ſtatement of the authorities of the law, but, ſo far as I am capable of giving it, an expoſition of their principles. In attempting that expoſition, I am perfectly conſcious of my liability to error, but am not willing to make a tacit ſacrifice of what I firmly and fairly conſider as the truth, and that upon a ſubject which, to a mind not affected by technical habits, would ſeem incapable of raiſing a queſtion.

It may frequently happen that a contract is compoſed of ſeveral parts, ſome objectionable, others not ſo. When that is the caſe, it becomes a queſtion whether the illegality of a part infects and vitiates the whole. A diſtinction, as is obſerved by Lord Chief Juſtice *Wilmot*, in the before-mentioned caſe of *Collins* v. *Blantern*, has been made upon this ſubject, between contracts void at com-

mon law, and ſuch as are void by ſtatute; and it was ſaid, that in the firſt caſe, if it be bad, or void in any part, it is void *in toto*; but that at common law it may be void in part, and good in part; the judges formerly thought an act of parliament might be eluded, if they did not make the whole void, if part was void (*a*); it is ſaid the ſtatute is like a tyrant, where he comes he makes *all* void; but the common law, like a nurſing father, makes only void that part where the fault is, and preſerves the reſt. 1 Mod. 35, 36. But I conceive that wherever an agreement is ſingle and entire, wherever there is one entire complex conſideration (*b*), and an eſſential part of it is repugnant to the principles of the law, the whole contract is invalid, whether the objection is founded upon the common law or upon a ſtatute; more eſpecially if it is a caſe at all affected by the objection of moral turpitude. But where different engagements contained in the ſame act are ſeparate and diſtinct, the mere invalidity of the one will not neceſſarily induce the deſtruction of the other.

A perſon cannot at the ſame time ſue for the execution of an agreement, and contend that part of that agreement is illegal. It was agreed upon a ſale of tobacco to take a particular parcel of bad copper in payment; the ſeller brought an action for the price of the tobacco, and inſiſted upon being paid in money, for that the contract to accept payment in bad money was illegal and void. But it was ruled by the court of King's Bench, that, ſuppoſing the agreement to be illegal, the plaintiff never could recover. It could not be ſaid that the ſale was good and the payment was bad; if it was an illegal contract, it was equally bad for the whole: it would be great injuſtice to permit the plaintiff to recover for the goods ſold, for that would be permitting him to take advantage of a corrupt agreement, which is never allowed in caſes where a party applies to the Court to ſet aſide ſuch agreements. *Alexander* v. *Owen*, 1 *T. R.* 225.

(*a*) 1 Lev. 209. Hard. 564.

(*b*) Where a perſon made a verbal promiſe to pay the debt of another (which is void by the ſtatute of frauds), and alſo to do another act, it was ruled that the agreement was entire, and that the plaintiff could not ſeparate it, and recover on one part of the agreement, the other being void. *Chater* v. *Beckett*, 7 *T. R.* 201. And in the caſe of *Bird* v. *Appleton*, 8 *T. R.* 562, which underwent a very frequent and attentive diſcuſſion, a policy effected upon an *American* veſſel at and from *Canton* was admitted to be void, the veſſel having brought goods from a *Britiſh* ſettlement to *Canton*, contrary to the navigation acts, and diſpoſed of them there, ſo that during part of the time that the parties intended the policy ſhould attach, namely, while the ſhip was *at Canton*, there was ſomething illegal in the tranſaction. There is an old caſe in which a promiſe in conſideration of an. and ſuffering an eſcape, was held void as to the whole. *Cro. Eliz.* 200.

NUMBER II.

(Referred to, Vol. I. p. 29.)

Of the Conſideration of Contracts.

To the preceding diſcuſſion upon the invalidity of contracts as founded upon the illegality of their conſideration, I ſhall next ſubjoin ſome obſervations concerning the neceſſity and ſufficiency of a conſideration according to the law of *England*; a ſubject very different from the preceding, as the objection founded upon the want of ſuch conſideration is merely negative, whereas the objection laſt conſidered is founded upon a poſitive wrong.

A gratuitous undertaking, ſeriouſly made, is certainly ſufficient to form the baſis of a moral and honorary obligation, and ought not to be receded from without ſome adequate reaſon; but in general a perſon does not intend to ſubject himſelf thereby to legal reſponſibility: and the object of law is rather to give effect to contracts founded upon the mutual exigencies of ſociety, than to compel the execution of a voluntary engagement of mere donation. But in moſt countries there are certain legal ſolemnities which indicate the ſerious intention of contracting a valid and effectual obligation, and which diſpenſe with the neceſſity of any actual conſideration. They import deliberation, and are inconſiſtent with the nature of thoſe promiſes that are in effect little more than the intimation of a preſent intention, and with regard to which, expreſſions only deſigned to indicate ſuch intention may eaſily be perverted into thoſe of abſolute engagement.

The principal mode of engagement, which in the *Roman* law diſpenſed with an actual conſideration, was a *ſtipulation*. The perſon, to whom the promiſe was to be made, propoſed a queſtion to him from whom it was to proceed, fully expreſſing the nature and extent of the engagement; and, the queſtion ſo propoſed being anſwered in the affirmative, the obligation was complete. It was eſſentially neceſſary that both parties ſhould ſpeak, (ſo that a dumb perſon could not enter into a ſtipulation) that the perſon making the promiſe ſhould anſwer conformably to the ſpecific queſtion propoſed, without any material interval of time, and with the intention of contracting an obligation. From the general uſe of this mode of contracting, the term *ſtipulation* has been introduced into common parlance, and in modern language frequently refers to any thing which forms a material article of an agreement; though it is applied more correctly, and more conformably to its original meaning, to denote the inſiſting upon and requiring any particular engagement.

The *nuda pacta*, which were thoſe agreements that had neither any definite name, nor any cauſe of creating an obligation beyond the engagement itſelf, did not induce any legal right. Vinnius ſays, that the *Roman* juriſprudence refuſed to give a compulſory force to theſe engagements, that they might reſt upon the mere integrity of the parties who contracted them, thinking it more honourable, and more conducive to the culture of virtue, to leave ſome things to the good faith and probity of mankind, than to ſubject every thing to the compulſory authority of the law. *Inſt. Lib.* III. *tit.* 14.

According to the law of *England*, a deed ſealed and delivered is in this reſpect analogous to the ancient ſtipulation. It is a ſolemn act, manifeſting the intention of the party to contract a legal obligation, and the engagement which it contains cannot be impeached for the mere want of conſideration; though, as has been already mentioned, an illegality of conſideration is equally fatal to all engagements in whatever manner conſtituted. A promiſe without a conſideration, unleſs contained in a deed, is void; and by the law of *England*, borrowing the expreſſion of the *Roman* law, is termed *nudum pactum*.

In one caſe, two very celebrated judges intimated an opinion, that the objection of want of conſideration could not be applied where the promiſe was in writing; and one of the ſame judges is ſtated to have ſaid, that in commercial caſes among merchants, the want of conſideration is not an objection. *Van Mierop* v. *Pillans*, 3 *Bur.* 1663. But theſe obſervations are contradicted by the general current of authorities, both prior and ſubſequent. In a caſe which occurred before the Houſe of Lords, recently after they were made, but which has only lately been publiſhed, it was urged that a promiſe, which appeared to be without conſideration, might have been made in writing; which would remove the objection: but the Chief Baron of the Exchequer, in delivering the opinions of the judges, ſaid, All contracts are by the law of *England* diſtinguiſhed into agreements by ſpecialty and agreements by parol; nor is there any ſuch third claſs as the counſel have endeavoured to maintain, as contracts in writing. If they be merely written, and not ſpecialties, they are parol, and a conſideration muſt be proved. *Rann* v. *Hughes*, 7 *T. R.* 350. *n.*

In fact, mere writing does not appear in the early periods of our law to have been much regarded. To write was an unuſual qualification, the want of which reflected no diſgrace even upon the higher claſſes of ſociety; and diſtinct appropriate ſeals were uſed for the atteſtation of ſolemn inſtruments. Since the knowledge of writing has become more diffuſed, thoſe appropriate ſeals have

fallen very much into diſuſe, the ſignature of a party being more notorious evidence.

That the want of conſideration ſhould be immaterial in mercantile tranſactions, is a propoſition equally deſtitute of ſupport; and, though it may never have been judicially contradicted in terms, is in effect inconſiſtent with ſeveral caſes of daily occurrence. The extent and adequacy of a conſideration in relation to the engagement with which it is connected, is allowed to be immaterial. The caſe of *Shulbrick* v. *Salmon*, 4 *Burr.* 1637, is an illuſtration of the principle that it is not requiſite that the conſideration ſhould be commenſurate with the promiſe, and that in caſe of mutual promiſes the engagement on the one ſide may be abſolute, whilſt that of the other is conditional. The defendant engaged that his ſhip ſhould ſail for *Winyaw* in *South Carolina* as ſoon as ready, the plaintiff engaging to load it there and pay a certain freight. There was a condition that if the ſhip did not arrive before the firſt of *March*, it ſhould be in the option of the plaintiff to load the ſhip or not. The defendant alledged that by contrary winds, the ſhip was prevented from ſailing within ſuch a time, that it could poſſibly arrive before the firſt of *March*. And it was contended on his part, that as the plaintiff would not be under an obligation to lade it upon an arrival after the firſt of *March*, it was not incumbent on himſelf to go there. It was ſaid, that the conſideration failed, and it was a covenant on one ſide only. But it was evidently the opinion of the court, that the engagement of freighting in caſe of an arrival before the firſt of *March*, was an adequate conſideration for the oppoſite engagement to go at all events. The deciſion more immediately turned upon the engagement being by deed, to which no conſideration is neceſſary. Lord Chancellor *Loughborough*, in a caſe which affords one of the fineſt modern ſpecimens of judicial eloquence, ſaid, that a bargain without a conſideration is a contradiction in terms, and cannot exiſt. *Middleton* v. Lord *Kenyon*, 2 *Veſ. Jun.* 188.

The caſe which I firſt cited as containing two obſervations that could not be ſupported, furniſhes the more correct principle, that any damage to another, or ſuſpenſion or forbearance of his right, is a foundation for an undertaking, and will make it binding; though no actual benefit accrues to the party undertaking. This principle was illuſtrated by the immediate point decided in the cauſe: for a perſon in *Rotterdam*, having paid the draft of another in *England* upon an offer of credit on a houſe in *London*; a letter from the partners of that houſe, that they would honour a bill which might be drawn, was adjudged to be obligatory, although the money had been advanced before the promiſe was made; as the merchant

in *Rotterdam*, by relying on that promiſe, might have been prevented from reſorting for further ſecurity to the perſon who originally drew upon him.

And in general it may be ſtated, that any act by which the perſon making the promiſe has benefit, or the perſon to whom it is made has any labour or detriment, is a ſufficient conſideration.

A conſideration, abſolutely paſſed before a promiſe is made, will not be ſufficient; for inſtance, a promiſe of reward in conſideration of having bailed a ſervant from priſon. *Dyer* 272. 1 *Rol. Abr.* 11. *Hayes* v. *Warren*, 2 *Str.* 933. But if an act is incomplete, the continuance and completion of it may ſupport a promiſe to make a compenſation for the whole that is done both prior and ſubſequent: as, if the aſſignees under a commiſſion of bankrupt promiſe the book-keeper of the bankrupt that, if he will continue to ſettle and arrange the books, they will pay him the arrears of his wages. See ſeveral caſes upon this ſubject, *Comyns*, Action of Aſſumpſit, *B.* 12. Where the act which is the conſideration of the promiſe is founded upon a preceding requeſt, it is ſufficient. See *Williams* n. *Oſborne*, v. *Rogers*, 1 *Saund.* 264.

Any preceding moral duty is alſo a ſufficient conſideration; as, if one perſon ſhould pay the expence of nurſing the child of another, or if medical aſſiſtance has been given to the pauper of a pariſh, a promiſe of payment by the father or overſeer would be obligatory. *Scott* v. *Nelſon*, *N. P. Eſp. Dig. Watſon* v. *Turner*, *Bull. N. P.* 147.

An engagement to pay a debt contracted during infancy, or barred by bankruptcy and certificate, is in general rather the waiver of an exception than an original contract; but under particular circumſtances they may form the ground of a ſpecific and poſitive obligation.

A promiſe, made to a perſon who is a ſtranger to the conſideration, cannot be ſuſtained except under particular circumſtances; as where, upon a ſervice being performed by a father, he ſtipulated for a reward to his daughter; and it was held that the daughter might ſuſtain an action upon this engagement. See *Dutton* v. *Poole*, 1 *Ventr.* 318. Sir *T. Jones*, 103. *Vi.* No. IV. *poſt.*

Where a perſon, who is already under an engagement of a limited nature, promiſes to perform that engagement, no new duty ariſes from the promiſe, nor is the obligation rendered more extenſive unleſs it is founded upon ſome freſh conſideration, as forbearance to ſue, a remiſſion of part of the obligation, *&c.* Therefore an executor promiſing to pay a debt of his teſtator, *Rann* v. *Hughes*, 7 *T. R.* 350. *n.* or a huſband promiſing to pay the debt of his wife,

Mitchinſon

Mitchinſon v. *Hewſon*, 7 *T. R.* 348. does not render himſelf perſonally liable, and is only chargeable to the amount of his aſſets in the firſt caſe, or jointly with his wife in the other, as if no ſuch promiſe had been made: the former of theſe points was eſtabliſhed in the caſe before the Houſe of Lords that has been already mentioned. The Chief Baron ſtated the poſition in the following terms: The being indebted is of itſelf a ſufficient conſideration to ground a promiſe; but the promiſe muſt be co-extenſive with the conſideration, unleſs ſome particular conſideration of fact can be found to warrant the extenſion of it. If a perſon indebted in one right, in conſideration of forbearance for a particular time, promiſe to pay in another right, this convenience will be a ſufficient conſideration to warrant an action againſt him in the later right. But in this caſe the executor derives no advantage or convenience from the promiſe here made; for, if I promiſe generally to pay upon requeſt what I was liable to pay upon requeſt in another right, I derive no advantage or convenience from the promiſe, and therefore there is not a ſufficient conſideration for it.

A doubtful right may be compromiſed, and that compromiſe may be the conſideration of a valid promiſe. But if one perſon has a right of action againſt another, and a ſatisfaction is agreed upon, the agreement is of no effect unleſs it is executed. It can furniſh no defence to the original demand on the one ſide, and is no foundation for a promiſe on the other. See *Lynn* v. *Bruce*, 2 *H. B.* 317. and the caſes there cited,—a rule which is rather founded upon precedent and authority, than upon any principles of reaſon. But a bond or a negotiable inſtrument, which furniſh in themſelves a direct cauſe of action, are a ſufficient execution of an accord and a defence againſt the original demand. See *Kearſlake* v. *Morgan*, 5 *T. R.* 513, and the caſes there cited.

Though a perſon, who gratuitouſly engages to perform any act for another, is not liable in law to any action for not performing his promiſe, he is anſwerable for any injury occaſioned by his negligence in the performance. This is the point decided in the important caſe of *Coggs* v. *Bernard*, 2 Lord *Raym.* 909. and is a principal ſubject of Sir *William Jones*'s Eſſay on the Law of Bailments.

The civil law has adopted a rule reſpecting the non-performance of ſuch a gratuitous commiſſion, which appears highly reaſonable, but has not (I conceive) been adopted in the law of *England:* That the commiſſion muſt be renounced in ſuitable time. *Vinnius*, in his commentary upon a paſſage in the inſtitutes to this effect, ſays, a renunciation is either timely, that is, whilſt the perſon for whoſe uſe the commiſſion is undertaken retains a perfect opportunity of tranſacting the ſame buſineſs with equal advantage;

or untimely, that is, when he can no longer tranſact the ſame buſineſs either by himſelf or by means of any other perſon; and that the perſon undertaking the commiſſion is anſwerable for any damage which may be incurred by an untimely renunciation, unleſs there is ſome juſt cauſe for it: for inſtance, if the party whoſe buſineſs is undertaken becomes inſolvent, ſo that the other will not be able to recover the expence which he may incur. Sir *William Jones* argues very forcibly, that the law of *England* ought to admit an action for the nonfeaſance of a gratuitous undertaking (or mandate) when ſpecial damage is occaſioned thereby. The caſe of *Elſee* v. *Gatward*, 5 *T. R* 143. is a determination to the contrary, but the particular point and the reaſoning connected with it were very ſlightly adverted to; the caſe being wholly referred to mere legal precedents, upon the general propoſition that an action cannot be maintained for the non-performance of a gratuitous promiſe. It is remarkable, that, whilſt the reaſoning of Lord Ch. *Holt*, in *Coggs* and *Bernard*, is generally cited with admiration, and the caſe itſelf is looked up to as of the firſt authority, ſo little recourſe has been had in ſubſequent caſes to the grand ſources from which that reaſoning is derived; that the mode of reaſoning and inveſtigation which has been ſo much approved ſhould have been ſo little purſued.

Where a contract is entered into, which is not executed on the one ſide at the time, but there is a mutual engagement to be performed at a future period, the promiſe of the one party is a conſideration for the promiſe of the other, and the engagement muſt become obligatory upon both parties at the ſame inſtant; ſo that a promiſe, however ſtrongly made, may be retracted until it has received validity from the aſſent of the other party; and if there is no other conſideration than the mutual promiſes, a condition leaving one of the parties an unqualified right to diſſent, may be taken advantage of by the other. This is confirmed by a deciſion which took place a few years ago in the King's Bench. *Oxley* agreed to ſell goods to *Cooke*, if he would purchaſe them, and give notice by four in the afternoon; he gave the notice, but as the engagement in the mean time was all on one ſide, the ſeller was held to be at liberty to recede. 3 *T. R.* 653. But this mutuality only refers to the complete intention of the parties, and not to thoſe exceptions which are introduced by the law for the benefit or protection of one of them; and of which that party has a right to take advantage in avoidance of the tranſaction. Thus in caſe a mutual contract is entered into between a minor and a perſon of full age, the one may take advantage of his minority, and reſiſt the completion of the agreement; but that right cannot be urged by the other, to

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ſhew that, as there was not a mutual legal obligation, there was not an adequate conſideration for his engagement. *Holt* v. *Ward, Clarencieux*, 2 *Str.* 973.

The caſe of a married woman is materially different, for ſhe is under a legal diſability to contract, and not merely entitled to a protection.

If one party to a contract has defrauded the other, it may be ſhewn againſt him as a bar to the performance; but it is manifeſt that he would never be admitted to alledge his own fraudulent conduct as an excuſe.

But it may not be neceſſary in every inſtance that the mutual promiſe ſhall be directly proved, provided it may be fairly preſumed; as, if a woman ſues upon a promiſe of marriage, it has been held that ſhe might recover though no actual promiſe from herſelf ſhould be ſhewn, provided ſhe has teſtified her aſſent by the general tenor of her conduct. *Hutton* v. *Manſell*, 3 *Salk.* 16. The caſe referred to is in a book of very inferior authority, but ſeems founded upon a fair and reaſonable principle.

The caſe of Bills of Exchange and Promiſſory Notes affords, in ſome degree, an exception to the general rule which has been under diſcuſſion. When they are indorſed over for a valuable conſideration, the want of conſideration between the original parties is immaterial; as between the immediate parties a conſideration is preſumed, but if the contrary is ſhewn, it is a ſufficient defence. It will not be neceſſary at preſent to enlarge upon the doctrine connected with theſe principles.

NUMBER III.

(Referred to, Vol. I. p. 32.)

Of Perſons capable or incapable of Contracting.

The power of tutors or curators to contract on behalf of the perſons under their charge, is not recognized by the law of *England*. The committee of a lunatic's eſtate has, under the authority of the Lord Chancellor, the management of his property; but cannot, as I conceive, enter into any contract which ſhall be regarded as obligatory upon the perſon intruſted to his care.

Some important obſervations were made reſpecting partial and general derangement of mind, by Lord *Thurlow*, in the caſe of the Attorney General v. *Parnther*, 3 *Bro. Ch. Rep.* 441. which it will be deſirable to cite. "There is" (he ſaid) "an infinite, nay an almoſt unſur-

unſurmountable difficulty in laying down abſtract propoſitions upon a ſubject which depends upon ſuch a variety of circumſtances, as the legal competency of the mind to the act in which it is engaged; if its competency be impeached by poſitive evidence of anterior derangement, or affected by circumſtances of bodily debility ſufficiently ſtrong to lead to a ſuſpicion of intellectual incapacity. General rules are eaſily framed, but the application of them creates conſiderable difficulty in all caſes, in which the rule is not ſufficiently comprehenſive to meet each circumſtance, which may enter into and materially affect the particular caſe. There can be no difficulty in ſaying, that if a mind be poſſeſſed of itſelf, at the period of time ſuch mind acted, it ought to act efficiently. But this rule goes a very little way towards that point which is neceſſary to the preſent ſubject; for though it be true, that a mind in ſuch poſſeſſion of itſelf ought, when acting, to act efficiently; yet it is extremely difficult to lay down with tolerable preciſion the rules, by which ſuch ſtate of mind can be tried. The courſe of procedure for the purpoſe of trying the ſtate of any party's mind allows of rules. If derangement be alledged, it is clearly incumbent on the party alledging it to prove ſuch derangement. If ſuch derangement be proved or admitted to have exiſted at any particular period, but a lucid interval be alledged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alledging ſuch lucid interval, who muſt ſhew ſanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance, that the evidence in ſupport of the allegation of a lucid interval, after derangement at any period has been eſtabliſhed, ſhould be as ſtrong, and as demonſtrative of ſuch fact, as where the object of the proof is to eſtabliſh derangement. The evidence in ſuch a caſe, applying to ſtated intervals, ought to go to the ſtate and habit of the perſon, and not to the accidental view of any individual, or to the degree of ſelf-poſſeſſion in any particular act; for from an act with reference to certain circumſtances, and which does not of itſelf mark the reſtoration of that mind which is deemed neceſſary in general to the diſpoſition and management of affairs, it were certainly extremely dangerous to draw a concluſion ſo general, as that the party who had confeſſedly before laboured under a mental derangement was capable of doing acts binding on himſelf and others".

The whole of this doctrine was laid down near a century before by M. *D'Agueſſeau*, as advocate-general in the parliament of *Paris* (the duty of which office in civil cauſes is that of aſſeſſor to the court), in the caſe of the Prince *De Conty*; a tranſlation of which

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I propoſe laying before the public, as containing a view of ſeveral important topics of general juriſprudence diſcuſſed with the moſt conſummate knowledge, and the moſt commanding eloquence. His deſcription of the nature of a lucid interval is as follows: "It muſt not be a ſuperficial tranquillity, a ſhadow of repoſe, but on the contrary a profound tranquillity, a real repoſe; not a mere ray of reaſon which only ſerves to render its abſence more manifeſt as ſoon as it is diſſipated, not a flaſh of lightening which pierces through the darkneſs only to render it more thick and diſmal, not a glimmering twilight which connects the day with the night, but a perfect light, a lively and continued radiance, a full and entire day ſeparating the two nights of the madneſs which precedes and that which follows it; and, to adopt another image, it is not a deceitful and faithleſs ſtillneſs, which follows or forbodes a tempeſt, but a ſure and ſteady peace for a certain time, a real calm and a perfect ſerenity; in ſhort, without looking for ſo many different images to repreſent our idea, it muſt not be a ſimple diminution, a remiſſion of the malady, but a kind of temporary cure, an intermiſſion ſo clearly marked that it is entirely ſimilar to the reſtoration of health. And, as it is impoſſible to judge in a moment of the quality of an interval, it is neceſſary that it ſhould laſt ſufficiently long to give an entire aſſurance of the temporary re-eſtabliſhment of reaſon; this period it is not poſſible to define in general, and it depends upon the different kinds of madneſs. But it is always certain that there muſt be a time, and that time conſiderable. Theſe reflections are not only written by the hand of nature on the minds of all men, the law alſo adds its characters in order to engrave them more profoundly in the heart of judges." (*a*)

In the ſequel of his judgment, the Lord Chancellor referred to the caſe of *Greenwood* and *Greenwood*, in which a queſtion turned upon this, "whether a mind ſound to general purpoſes, being influenced by a falſe imagination, an unreaſonable perſuaſion, in the doing a particular act, was not ſufficient to avoid ſuch act," and obſerved, "that a queſtion of ſo great extent involved ſerious conſideration." In that particular caſe there were contradictory verdicts, and the diſpute was probably ſettled by compromiſe. I cannot but think that a mental diſorder, operating upon particular ſubjects, ſhould, with regard to thoſe ſubjects, be attended with the ſame effects as a total deprivation of reaſon; and that, on the other hand, ſuch a partial diſorder, operating only upon particular ſub-

(*a*) Here he cited ſome paſſages from the civil law in ſupport of his obſervation.

jects,

jects, ſhould not in its legal effects have an influence more extenſive than the ſubjects to which it applies; and that every queſtion ſhould be reduced to the point, whether the act under conſideration proceeded from a mind fully capable, in reſpect of that act, of exerciſing a free, ſound, and diſcriminating judgment: but in caſe the infirmity is eſtabliſhed to exiſt, the tendency of it to direct or fetter the operations of the mind ſhould be in general regarded as ſufficient preſumptive evidence, without requiring a direct and poſitive proof of its actual operation. Where the exiſtence of derangement is ſhewn in general, the partiality of its operation in the particular inſtance ſhould be manifeſtly and incontcſtably proved, in order to prevent the application of its general effect.

There are ſeveral old authorities in the *Engliſh* law, that a perſon ſhall not be allowed to ſtultify himſelf; or, in other words, that he ſhall not be permitted to allege that his ſolemn acts are void, as having been done whilſt in a ſtate of mental incapacity; but that advantage could only be taken of the defect by his repreſentatives. Modern deciſions ſeem to have exploded this diſtinction, than which nothing could be more abſurd; for it is always a queſtion of fact, whether a given act is imputable to a given individual; and where the nature of the act requires a mind capable of rational aſſent, the want of ſuch capacity is a negation of the act imputed. An ample account of the principles which prevail in our courts of juſtice upon the ſubject of inſanity is given in Mr. *Fonblanque's* valuable notes to the treatiſe of equity.

With reſpect to drunkenneſs, Lord *Hardwicke* refuſed to ſet aſide an agreement on account of one of the parties being drunk when it was made, as there did not appear to have been any unfair advantage taken, and the agreement was reaſonable in itſelf. 1 *Veſ.* 19. But in a former caſe Lord Ch. Juſtice *Holt* held that a perſon might ſhew in oppoſition to the validity of a bond, that he was made to ſign it when he was ſo drunk that he did not know what he did. *Bull. N. P.* 192.

But though the mere circumſtance of being in a ſtate of intoxication is not ſufficient to vitiate an agreement, it would be evidently improper to conſider any act as binding which might be done by a perſon who (to uſe the language of the Treatiſe of Equity) is ſo exceſſively drunk that he is utterly deprived of reaſon or underſtanding; for it can by no means be a ſerious and deliberate conſent, and without this no contract can be binding by the law of nature.

Mere weakneſs of underſtanding, or a haraſſed and uneaſy ſtate of mind, not amounting to a poſitive derangement of intellect,

does not furniſh a ſubſtantive objection to the validity of a contract, but in conjunction with other circumſtances, eſpecially with the exerciſe of an improper influence, may be often very material in tainting a contract with fraud.

Mere infants cannot contract on account of the want of that underſtanding which is neceſſary to exerciſe a conſent; but beſides this, there is in almoſt every ſyſtem of law a period, during which perſons are under a legal protection, on account of the judgment not being ſufficiently matured: and though the mind, individually ſpeaking, may be fully capable of exerciſing an adequate judgment, the law which acts upon general principles, will not permit a valid engagement to be contracted within that period. The particular age of acquiring a legal capacity, muſt be in a great meaſure arbitrary. In *England* the age at which it is acquired is twenty-one, but there are gradations of age under that period at which a perſon acquires a legal capacity for particular purpoſes, as marriage, making a will, until a late ſtatute acting as an executor. All perſons under twenty-one are, in the technical language of the law, called infants.

To the general diſability of infants to contract, there is an exception in the caſe of neceſſaries. What ſhall be deemed neceſſaries is a queſtion of conſiderable latitude, but the term muſt in every caſe be applied with reference to the rank and fortune of the perſon to whom the articles are ſupplied; and neceſſaries to a perſon's wife or child born in wedlock, are neceſſaries to himſelf. Money advanced for the purpoſe of buying neceſſaries cannot be recovered, becauſe it may be miſapplied; but if money is lent to pay a debt contracted for neceſſaries, and it is applied accordingly, the court of chancery will give the lender relief by placing him in the ſituation of the original creditor.

There are alſo ſeveral other caſes in which the acts of infants will be ſupported if in their nature beneficial to themſelves, as agreements made by female infants previous to marriage, and with the approbation of their friends and guardians, or where the rule of law might operate the moſt fatal prejudice to the very intereſts it is intended to protect. For the detailed examination of theſe points, I ſhall refer to the notes already mentioned of Mr. *Fonblanque*.

It has long been ſettled, that an infant cannot even for neceſſaries enter into a bond with a penalty, though he may give a ſingle bill, an inſtrument which has now fallen into diſuſe. It has alſo been determined, that an infant cannot bind himſelf by ſtating an account which was formerly deemed a concluſive act, ſo that the items of it could

could not afterwards be conteſted, 1 *T. R.* 40. In the ſame caſe it became a matter of diſcuſſion whether he could bind himſelf by a negotiable promiſſory note given for neceſſaries, but the deciſion of the other point rendered an opinion upon that unneceſſary. I am very far from concurring with the gentleman to whom I have juſt referred, in thinking that the caſe affords an inference that an action would lie on a promiſſory note or other negotiable ſecurity given by an infant for neceſſaries, though in ſuch action, by a third perſon he would be precluded from impeaching the conſideration of it. Whether a proof that the note was given for neceſſaries would ſupport an action againſt an infant upon the note itſelf, is a queſtion upon which I do not offer to enquire; but to decide, that by giving a note or bill he ſhould incur an obligation more extenſive than his original liability for the neceſſaries ſupplied, would be ſubverſive of his legal protection altogether. In a former caſe it had been held, that an infant was not liable upon bill of exchange given in the courſe of trade. *Carth.* 160.

But it ſeems to be now eſtabliſhed as a general poſition, that the deeds of infants are not void but only voidable, or in other words, that they are not neceſſarily and abſolutely inoperative, although an exception may be taken to their validity by the infants themſelves, or others ſucceeding to their rights: and, as a conſequence of this rule, the acts of infants will admit of ſubſequent confirmation by which the exception may be waived, whereas acts abſolutely void cannot derive any greater effect from confirmation. To uſe the expreſſion of *Pothier*, infants are rather incapable of obliging themſelves by their contracts, than incapable of contracting; the principles of law reſpecting the acts of infants being void or voidable, are examined at length by Lord *Mansfield* in the caſe of *Zouch* v. *Parſons*, 3 *Bur.* 1794. A warrant of attorney is an excepted caſe from the general rule, and is abſolutely void. 2 *H. Bl.* 75.

Upon the moral juſtice of taking advantage of the exception of infancy, Mr. *Paley* has the following obſervations, nearly coinciding with a preceding paſſage in *Pothier*. "To preſerve youth from the practices and impoſitions to which their inexperience expoſes them, the law compels the payment of no debts incurred within a certain age, nor the performance of any engagements except for ſuch neceſſaries as are ſuited to their condition and fortunes. If a young man, therefore, perceive that he has been practiſed or impoſed upon, he may honeſtly avail himſelf of the privilege of his non-age to defeat the circumvention; but if he ſhelter himſelf under this privilege to avoid a fair obligation or an equitable contract, he extends the privilege to a caſe, in which it is not allowed by intention

tion of law, and in which conſequently it does not in natural juſtice exiſt."

Married women are by the law of *England* incapable of making any valid contract, and this is not as in the caſe of infants, merely a protection, but an abſolute diſability. Their contracts are not voidable, but void. A huſband is anſwerable for neceſſaries ſupplied to his wife ſuitable to his rank and fortune, but this is the contract of the huſband by the intervention of the wife, and not the perſonal contract of the wife. There are ſome excepted caſes to the general rule, that a married woman has no capacity to contract. The earlieſt exception is in the caſe of the huſband having abjured the realm; the caſes of the huſband being an alien enemy, or being baniſhed by act of parliament, or even tranſported for ſeven years, have ſince been added; and it has lately been determined, that the wife of a perſon living in a foreign country, was from the neceſſity of the caſe enabled to oblige herſelf by her contracts. *De Gaillon* v. *L'Aigle.* 1 *Boſ.* 357.

Property may be ſettled in various ways ſo as to be ſubject to the diſpoſition of married women, but this is by no means inconſiſtent with a general incapacity to contract; it is to be regarded merely as a modification of the particular property, and is not attended with thoſe circumſtances of perſonal liability which the act of contracting naturally implies.

In ſome modern caſes it has been held that where a married woman by agreement lives ſeparate from her huſband, and has a ſeparate maintenance ſettled upon her, her general diſability is removed, and that her contracts are equally obligatory with thoſe of other perſons.

The court of King's Bench aſſuredly aſſumed in thoſe deciſions an authority which reached the extreme limits of judicial diſcretion. In later caſes the courts evinced a great averſion to extend the doctrine further, and accordingly it was decided that a married woman by eloping from her huſband and living in adultery, or by carrying on a ſeparate trade, or by having an allowance of alimony during a ſuit in the ſpiritual court, does not acquire any ſpecial power to contract, which prevents the application of the general rule of law. And finally, upon ſolemn argument before all the judges, it was determined that a contract made by a married woman is void, notwithſtanding a ſeparate maintenance. By this deciſion, the authority of the caſes introducing a contrary doctrine is exploded, and the law is reſtored to its ancient channel. *Marſhall* v. *Rutton*, 8 *T. R.* 545.

By particular cuſtom, as in *London*, a wife may carry on trade ſeparately

ſeparately from her huſband, and with reſpect to ſuch ſeparate trade, ſhe is ſubject to the ſame liabilities as if ſingle.

NUMBER IV.

(Referred to Vol. I. p. 34.)

Of the Rule, that a perſon can only ſtipulate or promiſe for himſelf.

THE text of the Inſtitutes upon this ſubject ſays, that if one man promiſes that another ſhall give or do any thing he is not bound, as if he undertakes that *Titius* ſhall give five pounds, but if he engages to procure *Titius* to give five pounds, he is bound. *Si quis alium daturum facturumve promiſerit non obligabitur, veluti ſi ſpondeat Titium quinque aureos daturum; quod ſi effecturum ſe ut Titius daret ſpoponderit, obligatur.* *Vinnius* in commenting upon this paſſage, obſerves, *Noſtris et multorum aliorum moribus qui factum alienum promittit, tacite intelligitur promittere ſe curaturum aut effecturum ut alius det aut faciat.* I conceive that the rule itſelf is no where formally adopted in the law of *England*, and can have no other effect than as it neceſſarily reſults from the natural reaſon of the thing; and that if one man engages that an act ſhall be done by another, he is liable to damages in caſe it is not done, provided there are the other requiſites for an obligatory contract. The diſtinction, however, is in a great meaſure verbal, as according to all the ſyſtems of juriſprudence, it becomes finally a queſtion of intention, whether the party engaged perſonally that the act ſhould be done, and meant to ſubject himſelf to the ſame reſponſibility in caſe of non-performance, as if the engagement related to an act of his own. With reſpect to one perſon receiving a promiſe for the benefit of another, it has been held that an action might be maintained by a daughter for non-performance of a promiſe made to her father for her benefit upon a conſideration moving from the father. *Dutton* v. *Poole*, 1 *Ventris* 318. 332. *T. Jones* 103. the nearneſs of the relation between the father and the daughter was held ſufficient to entitle her to maintain the action upon the promiſe to her father. Lord *Mansfield* has ſaid, that it was difficult to conceive how a doubt could be entertained upon the point (*Cowp.* 837, *Doug.* 146,) but the deciſion was certainly very anomalous; and in other caſes it has been held, that a perſon, for whoſe benefit a promiſe was made to another, could not maintain an action for the non-performance of it. 1 *Ventris* 6. 1 *Str.* 592. But I conceive, that according to the law of

of *England*, (differing in this reſpect from the civil law,) an action may be maintained by the perſon to whom the promiſe was made, although the benefit reſulting from it was intended for another.

In the caſe of *Marchington* v. *Vernon*, at *niſi prius*, *T.* 27 *Geo.* 3. *B. R.* 1 *Boſ.* & *P.* 101. *n.* where the holder of a bill recovered againſt the aſſignees of the drawee, upon their promiſe of payment made to the drawer, it was ſaid by *Buller*, that, independent of the rules which prevail in mercantile tranſactions, if a perſon makes a promiſe to another for the benefit of a third, that third perſon may maintain an action upon it. The reporters laſt mentioned truly obſerve, vol. 3. 149. *n.* that with reſpect to the right of a third perſon, to ſue upon a parol promiſe made to another for his benefit, there is great contradiction amongſt the older caſes, all of which are collected, 1 *Vin. ab. fo.* 333 to 337. *Action of Aſſumpſit.* See *Feltmaker's*, *Comp.* v. *Davis*, 1 *Boſ.* 98. In *Piget* v. *Thompſon*, 3 *Boſ.* 147. it was decided, that upon an agreement made with the commiſſioners of a turnpike road, to take the toll at a certain rent to *be paid to the treaſurer*, no action could be maintained by the treaſurer, but that deciſion was rather founded upon a conſtruction of the intention, than upon the application of any general rule, as to the right of one perſon to ſue upon the promiſe made for his benefit to another.

In *Martyn* v. *Hinde*, *Cowp.* 437. it was contended that a certificate given by a rector to the biſhop, upon the appointment of curate, undertaking to continue him at a certain ſalary until otherwiſe provided for, was merely a contract with the biſhop, and for his indemnity, upon which no action could be maintained by the curate; but it was truly anſwered by the court, that this was not a contract with the biſhop, but a certificate and aſſurance to him of a matter of fact, *i. e.* it was evidence of an actual contract with, and promiſe to the curate.

Where an engagement is made by deed, or otherwiſe, to A, for the benefit and on the behalf of B, and the action is brought by A, or the engagement is performed to him, the conſequent obligations between A and B depend upon principles unconnected with, and irrelevant to the preſent diſcuſſion; which is confined to the obligation, and reſponſibility of the original debtor.

In equity, it is a leading principle, that all the perſons concerned in intereſt muſt be parties in the ſuit, and an arrangement is made according to the ſubſtance of the tranſaction, and the real intereſts of the perſons entitled, without reference to the mode or circumſtances of the contract, which are only regarded as inſtrumental to the intereſt; and it is the peculiar pro-

vince and characteriſtic diſtinction of thoſe courts, to obviate the technical difficulties which might ariſe from the mode and form of the tranſaction in a court of law.

The remaining topic of conſideration, is the recognition ſometimes admitted by courts of law, of the real and ſubſtantial intereſt in the ſuit, and of the character of the perſon actually intereſted, as diſtinct from the perſon who inſtitutes the ſuit, as upon an engagement made to himſelf.

Where a bond was made to A for the benefit of B, it was held that the latter could neither ſue upon it, nor releaſe it. *Offley* v. *Ward*, 1 *Lev.* 235. The ſame rule would apply in the caſe of an aſſignment of a bond, by the obligee to a third perſon: the action muſt be brought in the name of the original obligee. In theſe caſes, if the obligee releaſed the obligor, it might be pleaded as a defence by the obligor, and I apprehend that in general it could be no anſwer to ſtate upon the record the original truſt or the ſubſequent aſſignment, but in the exerciſe of the ſummary juriſdiction which the courts poſſeſs over the proceedings before them, where the obligee by colluſion with the obligor gave him a releaſe, it was held that it might be ſet aſide, and alſo that the obligor could not be allowed to plead payment to the obligee. *Legh* v. *Legh*, 1 *Boſ.* 447. I conceive, that if there is a releaſe from, or ſatisfaction to the party actually intereſted, the court in the ſummary exerciſe of its diſcretionary power, will ſtay the proceedings of the perſon nominally entitled.

In *Bottomley* and *Brook*, and *Rudge* v. *Birch*, cited 7 *T. R.* 664, it was held, that a defendant might plead that the bond on which he was ſued was given to the obligee in truſt for another perſon, which other perſon was indebted in a larger amount to the defendant.

In *Winch* v. *Kelly*, 1 *T. R.* 619, it was pleaded that the plaintiff had become a bankrupt; to which he replied that he had previouſly aſſigned over his debt to another perſon for a valuable conſideration, and the replication was held to be good. The ſame principle muſt apply to the caſe of an engagement being originally made to one perſon for the benefit of another.

Where a contract is made with a factor, an action may be brought upon it, either in his own name, or in the name of the principal. In the latter caſe, it is conſidered as the tranſaction of the principal throughout, and no particular obſervations are applicable to it, connected with the preſent diſcuſſion. With reſpect to actions in the name of the factor, it was pleaded to a declaration on a policy of inſurance, that the perſons intereſted were alien enemies; to this it was replied, that the policies were effected before

before the war, and that the parties intereſted were indebted to the plaintiff, who had a lien on the monies to be recovered in the action, to a greater amount than the ſum claimed, and judgment was given for the defendant. *Brandon* v. *Neſbett*, 6 *T. R.* 23. But this caſe proceeding upon principles of public policy, is no authority in reſpect to general caſes not affected by the ſame conſideration, and does not eſtabliſh any general propoſition, that a perſonal diſability in the party beneficially entitled, is a bar to an action inſtituted on his behalf, by another to whom an engagement is nominally made.

An action was brought in the name of a conſignor of goods as factor, againſt a carrier for damage occaſioned by neglect. A letter written by the plaintiff was adduced in exculpation of the defendant: the effect of this was objected to, as it appeared by the ſame letter that other perſons were the real owners of the goods, and that they had indemnified the plaintiff; and it was argued that the perſons intereſted ought not to be prejudiced by the admiſſion of their agent; but it was held that the admiſſion of the plaintiff on the record muſt be evidence in the cauſe. *Bauerman* v. *Radenius*, 7 *T. R.* 663.

Lord *Kenyon* in that caſe made ſeveral valuable obſervations, as to the impropriety of innovating upon the ſettled principles of the law, in order to meet the exigencies of particular convenience.

I hope that I ſhall be excuſed for having extended this diſcuſſion ſo far beyond the limits of the ſubject which immediately occaſioned it.

NUMBER V.

(Referred to, Vol. I. p. 53.)

Of the Interpretation of Agreements.

As every contract derives its effect from the intention of the parties, that intention, as expreſſed or inferred, muſt be the ground and principle of every deciſion reſpecting its operation and extent, and the grand object of conſideration in every queſtion with regard to its conſtruction.

Mr. *Powell* defines *conſtruction* to be the drawing an inference by the act of reaſon, as to the intent of an *inſtrument*, from given circumſtances, upon principles deduced from men's general motives, conduct, and action.

This definition may perhaps not be ſufficiently complete, inaſmuch as the term *inſtrument* generally implies ſomething reduced into writing, whereas *conſtruction* is equally neceſſary to aſcertain the

meaning of engagements merely verbal. In other reſpects it appears to be perfectly accurate. The Treatiſe of Equity defines *interpretation* to be the collection of the meaning out of ſigns moſt probable.

Where an agreement is of known and general nature, it is unneceſſary to expreſs the circumſtances which are commonly incident to it; theſe are neceſſarily preſumed to be in the contemplation of the parties, and if any variation is intended, that muſt be particularly mentioned; long and uninterrupted uſage may afford certainty to expreſſions which are vague and inaccurate in themſelves, and give effect to inſtruments which would be otherwiſe unintelligible and void. This is the caſe with regard to policies of inſurance, which modern judges have agreed in conſidering as very inaccurate, and imperfect in their original ſtructure, but as having acquired a definite ſignification from the long period during which the ſame form has ſubſiſted, and the general adoption which it has received.

But, in aſcribing the true conſtruction to contracts of a detached and independent nature, or to thoſe variations which are occaſionally and ſpecially introduced in regard to contracts in general uſe, and of definite ſignification, conſiderable difficulties frequently ariſe, the ſolution of which muſt chiefly depend upon conſidering the principal object of the contracting parties, the greater ſubſerviency to that object in adopting the one or the other conſtruction of ambiguous phraſe; the mutual relation of the different parts, with the mutual illuſtration which they may contribute or receive; and in caſes where a manifeſt abſurdity or repugnance may reſult from a literal conſtruction of the terms employed by reſtraining or extending their general ſignification, according to the evident reaſon and juſtice of the ſubject, and the intention which may from thence be reaſonably inferred.

Wherever a ſpecial agreement is entered into, it is of importance diſtinctly to expreſs the object which is in view, not reſting too much upon the force and efficacy of a general expreſſion applied to an unuſual ſubject; and alſo to conſider and provide for the different contingencies which may eventually ariſe.

The want of this caution has often been productive of conſiderable confuſion, and Lord *Mansfield* has in ſeveral inſtances taken notice of the want of accuracy in deſcribing the intended import of ſpecial agreements, or in ſupperadding particular clauſes in mercantile tranſactions; though it is agreed that they ought to have a liberal interpretation, and are not reſtricted to any technical expreſſions. Speaking of the effect of the common agreement in a policy to return part of the premium, if the ſhip ſails with convoy,

voy, *and arrives*, after mentioning the general inaccuracy which has been already adverted to, he ſaid, "It is amazing, that when additional clauſes are introduced, the merchants do not take ſome advice in framing them, or beſtow more conſideration upon them themſelves. I do not recollect an addition being made, which has not created doubts on the conſtruction of it." *Simond* v. *Boydell*, *Doug.* 255.

A full deſcription of the intention is very different from an unneceſſary multiplication of words, which is in itſelf a ſource of conſiderable confuſion, both in private tranſactions and in acts of public authority. Speaking of the charter-parties of the Eaſt India Company, Lord *Mansfield* ſaid, the charter-party is an old inſtrument, unformal, and by the introduction of different clauſes, at different times, inaccurate, and ſometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. Many of the difficulties which have been raiſed are occaſioned by the multiplicity of unneceſſary words, introduced with a view to be more explicit, an effect which often ariſes from the ſame cauſe in acts of parliament. *Hotham* v. *Eaſt India Company*, *Doug.* 272. Upon any addition being made to, or any alteration being introduced in accuſtomed form, its effect and tendency upon the whole ſhould be attentively conſidered, ſo that the remaining parts of the form may be properly adapted to the new proviſions, in order to avoid thoſe inconſiſtencies and contradictions, which for want of ſuch attention frequently ariſe.

If the language of an agreement is not attended with any real ambiguity or uncertainty, and is not controuled or affected by an eſtabliſhed uſage or general principle of law, it is not reaſonable to recur to an arbitrary conſtruction founded upon an uncertain ſuppoſition of the intention of the contracting parties, or upon the courſe which they would probably have purſued if an accidental contingency had been foreſeen (*a*). Thus, where two ſucceſſive tenants of a farm, having each a diſpute with a third reſpecting the condition in which they had reſpectively left the hedges, it was agreed to refer all the diſputes to arbitration, and the two *jointly and ſeverally* promiſed to perform the award; it was contended, that as the two had no joint intereſt in reſpect of that part of the ſubject to which the award related, it was therefore an agreement in three parts, for which one was not anſwerable for the other. But Lord *Kenyon* ſaid, this is rather a hard caſe; perhaps if it had been ſtated to the two tenants at the time of the

(*a*) Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt. *Co. Lit.* 147. a. Divinatio non interpretatio eſt, quæ omnino recedit a literâ. 3 *H.* 6. *f.* 20. *Bern.*

agreement, that each of them was to be anſwerable for the other, they would have heſitated before they ſigned the agreement; but the words of the agreement are too ſtrong to be got over. It was reaſonable that each ſhould make ſatisfaction for the time that each occupied; but by the terms of this agreement they have promiſed jointly and ſeverally, which makes them reſponſible, the one for the other. *Manſell* v. *Burredge*, 7 *T. R.* 352.

The ſame principle was acted upon in a caſe which underwent a very great and repeated conſideration reſpecting the effect of the common clauſe in a policy of inſurance, that corn, fruit, &c. are warranted free from average, unleſs general, or the ſhip ſtranded. The ſhip was ſtranded in the courſe of the voyage, and alſo ſuſtained an average loſs; but ſuch loſs was not occaſioned by that circumſtance, but by another accident of a different nature. On the one hand it was ſaid, that the introduction of the clauſe was occaſioned by the periſhable nature of the commodities enumerated, and becauſe it could not be diſtinguiſhed whether the loſs was occaſioned by that circumſtance or by the accidents of navigation; that therefore the indemnity was reſtrained to an accident, in its nature ſo notorious as ſtranding. On the other hand, the grammatical conſtruction was inſiſted upon, and the clauſe was conſidered as a mutual conceſſion to avoid enquiries into the particular facts or cauſes of the deterioration, to diſclaim all average loſs if there was no ſtranding, and to attribute the loſs concluſively to it if there was. The court decided that the inſurers were liable, and lord *Kenyon*, in the courſe of his judgment, ſaid, if a general proviſion is made in any deed or inſtrument, and it is there ſaid that certain things ſhall be excepted, unleſs another thing happen, which gives effect to the general operation of the deed; if that other thing does happen, it deſtroys the exception altogether. Without inquiring into the reaſons for introducing this exception, on the grammatical conſtruction of the whole I have no doubt. If it had been intended that the underwriters ſhall be only anſwerable for the damage that ariſes in conſequence of ſtranding, a ſmall variation of expreſſion would have removed all difficulty. *Barnet* v. *Kenſington*, 7 *T. R.* 222. And in a ſubſequent caſe alſo ariſing upon policy of inſurance, he ſaid, the words here uſed are not equivocal, and we ought not to depart from them; it would be attended with great miſchief and inconvenience, if in conſtruing contracts of this kind we were not to decide according to the words uſed by the contracting parties; the grammatical conſtruction of the words is the ſafeſt rule to go by. *Boehem* v. *Sterling*, *T. R.* 423.

And in a queſtion reſpecting the conſtruction of a leaſe, he ſaid, if

if I were to indulge in conjecture and ſpeculation as to any ſuppoſed intention of the parties not expreſſed in the deed, I ſhould have as little doubt (as upon the words); but I diſclaim proceeding upon any ſuch ground. It is ſufficient for me to ſay, that the leſſee has not entered into the covenant inſiſted upon by the leſſor; the parties have met here upon the conſtruction of a ſolemn inſtrument, in which their reſpective rights and duties are clearly preſcribed; and we cannot ſubſtitute any other contract in lieu of that into which they have entered. *Gerard* v. *Clifton*, 7 *T. R.* 676.

This ſubject has alſo been very well conſidered in a caſe before the ſupreme court of the United States of *America*, reſpecting the conſtruction of the treaty of peace with *Great Britain*. During the war the State of *Virginia* made a law, that all perſons indebted to *Britiſh* ſubjects might pay the amount into the loan-office, which ſhould be a good diſcharge. By the treaty of peace it was provided that "creditors of either ſide ſhould meet with no lawful impediments for the recovery of their debts." The defendant had paid the money into the loan-office; but it was held that in conſequence of the treaty of peace he was liable to the plaintiff. Judge *Chace*, in giving his opinion to that effect, ſaid, "In the conſtruction of contracts, words are to be taken in their natural and obvious meaning, unleſs ſome good reaſon be aſſigned to ſhew that they ſhould be underſtood in a different ſenſe. The univerſality of the terms is equal to an expreſs ſpecification on the treaty, and indeed includes it. For it is fair and concluſive reaſoning, that if any deſcription of debtors or claſs of caſes was intended to be excepted it would have been ſpecified. The indefinite and ſweeping words made uſe of by the parties exclude the idea of any claſs of caſes having been intended to be excepted, and explode the doctrine of conſtructive diſcrimination. The article appears to come within the firſt general maxim of interpretation laid down by *Vattel*: "It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and preciſe terms, when the ſenſe is manifeſt, and leads to nothing abſurd, there can be no reaſon to refuſe the ſenſe which this treaty naturally preſents. To go elſewhere in ſearch of conjectures, in order to reſtrain or extinguiſh it, is to endeavour to elude it. If this dangerous method be once admitted, there will be no act which it will not render uſeleſs. Let the brighteſt light ſhine on all the parts of the piece, let it be expreſſed in terms the moſt clear and determinate; all this ſhall be of no uſe, if it be allowed to ſearch for foreign reaſons in order to maintain what cannot be found in the ſenſe it naturally preſents." *Vatt. B.* 2. *c.* 17. § 263. *Ware* v. *Hylton*, 3 *Dallas'*

Reports, 199. The whole of this case, and also of a case of *Hamyltons* v. *Eaton*, *Martin*, 79. in which the same point was decided by the circuit court of *North Carolina*, very well deserve attention, as containing a clear and instructive view of the nature and effects of treaties.

NUMBER VI.

(Intended to have been referred to, Vol. I. p. 72. N° 121.)

Of Injuries and Neglects.

The doctrine, that fathers and others shall be responsible for the acts of children under their care, which it was in their power to prevent, appears highly reasonable; but I am not aware of any case in which it is adopted in the *English* law.

With respect to the responsibility of masters for the acts of their servants, a singular distinction has been taken, that the master is only responsible for the injuries of his servant, which arise from negligence, and not for those which proceed from his wilful wrong. *Salk.* 441. *Day* v. *Edwards*, 6 *T. R.* 648. *M'Manus* v. *Crickett*, 1 *East*, 106. (*a*). An action cannot be maintained against a servant, who hires labourers for his master on account of acts done by them; it must be either against the persons committing the injury, or the master for whom the act was done. *Stone* v. *Cartwright*, 6 *T. R.* 412.

It seems extremely clear that with respect to acts committed by servants, without reference to the functions in which they are employed, no responsibility attaches to the masters. Mr. Justice *Buller*, speaking in illustration of the question, how far a man was bound by the act of an agent executing his commission, said "There is a class of cases which have been thought to bear extremely hard upon masters, who are held liable for the misfeasance of their servants, in driving their carriages against those of third persons; but those cases must have been determined on the ground, that it must be presumed that the servants have acted under the orders of their masters. But suppose a master ordered his servant not to take his horses and carriage out of the stable, and the latter went in defiance of his master's orders, there is no authority which says that the master shall be liable for any injury done to another, by such act of the servant, though indeed if the master had ordered the servant to go a particular journey, and in

(*a*) In this case, a very full and accurate view of the law upon the subject is taken by Lord *Kenyon*.

the

the courſe of it the latter did an injury to ſome third perſon, the authorities ſay that the maſter is liable; *Fenn* v. *Hamſon*, 3 *T. R.* 717. In *Middleton* v. *Fowler*, *Salk.* 282, it is laid down by Lord Ch. Juſtice *Holt* as a general poſition, that no maſter is chargeable with the acts of his ſervant, but when he acts in the execution of the authority given him: and Lord *Kenyon* having cited that opinion on the caſe above alluded to, of *M'Manus* v. *Crickett*, ſays; "Now when a ſervant quits ſight of the object for which he is employed, and without having in view his maſters orders, purſues that which his own malice ſuggeſts, he no longer acts in purſuance of the authority given him, and, according to the doctrine of Lord *Holt*, his maſter will not be anſwerable for ſuch act."

A different principle was adopted in a caſe at the Exchequer Sittings, in which it was held that a ſervant of a glaſs-houſe nowiſe employed in filling the pots, and not having any thing to do with the management of them, who threw in ſome broken glaſs for the purpoſe of ſecreting it from the maſter, ſubjected the maſter to a penalty impoſed upon putting materials into a pot without notice to the officer. The jury were told generally that the maſter was anſwerable for the acts of all the ſervants employed in the manufactory, without adverting to the diſtinction of the act's being totally foreign to the functions to which they were engaged. *Attorney General* v. *Perrin*, ſittings after Michaelmas 1798. As to the liability of a ſheriff for the acts of his officers, ſee *Woodgate* v. *Knatchbull*, 2 *T. R.* 148.

NUMBER VII.

(Referred to, Vol. I. p. 122.)

Of Mutual Agreements.

Where there are mutual agreements, it often becomes a queſtion of importance whether they are mutual and independent, in which caſe either party is entitled to claim a performance from the other, or to recover damages for the non-performance, and it is no excuſe to allege that he has himſelf been guilty of a breach in the performance of the agreement? 2d Whether they are conditions, and dependent, in which caſe the performance of the one, depends upon the prior performance of the other? Or, 3dly Whether they are mutual, and to be performed at the ſame time, and in which, if one party is ready and offers to perform his part, he may maintain an action for the default of the other, although it is not certain that

that either is obliged to perform the firſt act? See *Bromley* v. *Smith*, cited *Doug.* 690.

In this, as in all other reſpects, the intention of the parties may be poſitively expreſſed, and then there is no room for conſtruction, as if a horſe is ſold on the firſt of *May*, to be paid for on the firſt of *June*. But ſuppoſing there to be no diſtinct and abſolute agreement upon the ſubject, the dependence or independence of the reſpective engagements is to be collected from the evident ſenſe and meaning of the parties, and however the covenants may be tranſpoſed, their precedency muſt depend upon the order of time in which the intent of the tranſaction requires their performance.

Each of theſe diviſions may be illuſtrated by familiar inſtances. A landlord and tenant enter into reciprocal engagements; the tenant agrees to pay the rent, to plant a certain number of trees, to repair the fences; the landlord agrees to repair the houſe, to erect a barn, to pay the taxes. If the tenant brings an action againſt the landlord for not building the barn, it is no anſwer that the tenant has not planted the trees. If the landlord brings an action for the rent, the tenant cannot inſiſt that the houſe is out of repair. 2d, If a carrier engages to convey a bale of goods for a certain ſum, he cannot demand the money until he has brought the goods to the place appointed; a weaver cannot demand his wages until he has completed his piece. 3d, If a horſe is ſold for 20*l.* to be paid on delivery, one party cannot demand the horſe, without paying the money, nor the other the money, without delivering the horſe. In ſome of the older caſes upon this ſubject, we meet with deciſions apparently contrary to theſe principles, and which are founded rather upon too minute an attention to words, than upon conſidering the nature of things. Modern determinations have marked the true diſtinctions reſulting from the purpoſe and object of the contracting parties. Lord *Manſfield*, who ſtated the threefold diviſion already mentioned, has alſo furniſhed us with the proper rule for the application of it. The diſtinction is very clear: where mutual covenants go to the whole of the conſideration on both ſides; they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy in his covenant, and ſhall not plead it as a condition precedent. The caſe to which that diſtinction was referred, was a conveyance of the reverſion of a plantation with the negroes upon it, in conſideration of a ſum of money, and an annuity. And it was held that the purchaſer could not with-hold the payment

ment of the annuity, on account of the ſeller not being legally poſſeſſed of the negroes, otherwiſe any one negro, not being the property of the ſeller, would be a defence, *Boon* v. *Eyre*, 1 *H. B. Bl. Rep.* 273. and upon the ſame principles it has been ſince decided, that if a perſon having a patent, agrees to let another have the free uſe of the invention, and to inſtruct him with all poſſible expedition in the uſe of it, for which the other promiſes to pay 500*l.* upon a particular day, it is no excuſe for refuſing to pay the money, to ſay that he has not been completely inſtructed. *Campbell*, v. *Jones*, 6 *T. R.* 571.

In general, where it is a ſingle act that is to be performed upon each ſide, the rule that one party can only claim a performance of the other's engagement, by offering to perform his own, manifeſtly applies; ſuch are all executory contracts of ſale without ſpecial proviſion to the contrary; *Goodiſon* v. *Nunn*, 4 *T. R.* 671. *Morton* v. *Lamb*, 7 *T. R.* 125. *Glazebrook* v. *Woodrow*, 8 *T. R.* 366. The rule has been ſo far relaxed, that it has been held ſufficient for the purchaſer to aver, that he was ready and willing to pay for the article ſold, and ready and willing to receive it, but that the ſeller refuſed to deliver it. Lord *Kenyon* obſerved, that the plaintiff was bound to prove that he was prepared to pay or tender the money; if the defendant had been ready to receive it, and to deliver the goods. *Rawſon* v. *Johnſon*, 1 *Eaſt. Rep.* 203. confirmed by *Waterhouſe* v. *Skinner*, 2 *Boſ. & Pul.* 447. This relaxation was certainly very judicious, as it prevented the party from being injured of his right, for the want of making a formal tender, the neceſſity of which would only occur to the mind of a perſon habituated to legal ſtudies; but in order to ſupport the allegation, I conceive it is eſſentially requiſite to prove an actual and poſitive refuſal, and that a mere non-feazance would not be ſufficient; in caſe of ſuch actual refuſal being proved, I do not think it would be proper to exact very rigid proofs, that the perſon who came to demand the execution of a ſale was prepared with money for the payment; for if the fact appeared to be no more than a refuſal to deliver without immediate payment, the allegation would not be ſupported; and if the refuſal was abſolute, the perſon who had wholly diſclaimed an intention of performance on his own part, would not be very favourably heard in requiring a proof of the power of performance in the other party.

The queſtion, whether an agreement is mutual, ſo that neither of the parties can demand a performance of the engagement of the other, without a performance or readineſs to perform his own, is eſſentially different from that which turns upon what ſhall be admitted as readineſs, and whether the act, of which the non-perform-

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ance is objected does or does not conſtitute an eſſential part of the engagement, the performance of which is admitted to be requiſite for enforcing the reciprocal obligation: as to which, ſee the before mentioned caſe of *Boon* and *Eyre*, the obſervations thereon in *Glazebrook* and *Woodrow*, and Duke of St. *Albans* v. *Shore*, 1 *H. Bl.* 270. cited vol. 1. p. 116. note (*a*). All the caſes upon this ſubject are accurately collected, and the reſult of them judiciouſly ſtated by Mr. Serjeant *Williams*, in his notes to *Pordage* v. *Cole*. 1 *Saund.* 320. *Hunlock* v. *Blacklow*, 2 *Saund.* 157. *Peters* v. *Opie*. 2 *Saund.* 350.

'Where the act of one party is a condition precedent to the obligation of the other, it has been held, that he muſt do every thing which can be done without the concurrence of the other, before the obligation can attach, and in ſome inſtances this rule has been applied with very great ſtrictneſs, *Lancaſhire* v. *Killingworth*, 2 *Salk.* 623. But it is now ſettled, that if the party who is under the conditional engagement, diſcharges the other from the performance of the condition, the obligation is complete and abſolute. *Jones* v. *Barkeley*, *Doug.* 684. cited vol. 1. p. 122. note (*c*).

NUMBER VIII.

(Referred to, Vol. I. p. 124.)

Of Apportionment.

The law concerning apportionments may be divided into two principal heads: 1ſt, As it refers to caſes of a certain property, being unequally divided between different perſons, ſubject to a certain charge, as in the caſe of an eſtate deviſed to A. for life, with remainder to B. in fee ſubject to a mortgage, or where a leaſehold eſtate is divided to A. for a particular intereſt and to B. for the reſidue, and a fine is paid for the renewal for their common benefit. In theſe caſes, the whole mortgage or fine is paid, and the queſtion ariſes as to the manner of dividing the charge amongſt thoſe entitled to the benefit, it being certain that an apportionment muſt in ſome manner be made. For the rules upon this ſubject, ſee *Nightingale* v. *Lawſon*, 1 *Bro. Ch.* 440. *Stone* v. *Theed*, 2 *Bro. Ch.* 243, and the caſes there cited, *White* v. *White*, 4 *Veſ.* 24.

The 2d head, which is alone connected with the ſubject under diſcuſſion in the text, relates to certain claims or duties due in entire ſums, and involves the general rule, that where the whole duty does not attach, the whole of it fails, and is loſt, notwithſtanding

ſtanding the occurrence of part of the condition (in which deſcription I include a partial efflux of time) upon which it is to ariſe.

It is a general rule, that a perſonal contract cannot be ſevered or apportioned; and upon this principle it was held, that where A. appointed C. to receive his rents at a certain annual ſalary, and at the end of three quarters of the year A, the maſter died; nothing was due without a full year's ſervice, and it was in the nature of a condition precedent; *Counteſs of Plymouth* v. *Throgmorton*, 1 *Salk.* 65. In 3 *Viner's* Abridgement, p. 8. title *Apportionment*, there is a letter from that induſtrious compiler, to Sir John *Strange* (afterwards Maſter of the Rolls), reſpecting a cauſe of *Worth* and *Viner* at *niſi prius*, which Sir John had at the trial (tauntingly, as it ſeems) recommended to be publiſhed in the abridgement; deſiring a ſtatement of that caſe, and that Sir John (who had ſucceeded in perſuading the jury to give a proportionate part of wages upon a yearly *hiring*), would point out ſome caſes, or a ſingle caſe at leaſt, out of the year books, *Fizherbert* or *Brook*, or any book of reports ſince, wherein it had been adjudged that a contract for wages is apportionable. He adds, that a gentleman having called to inform him that Sir John could not furniſh any ſuch report: "Whereupon I told the gentleman of the other part of my letter, and mentioned that I had never yet met with any caſe that would ſupport ſuch apportionment: nor could I find any gentleman at the bar that had, though I aſked ſeveral; that I thought every gentleman ought to do the beſt he could for his client, as far as was conſiſtent with juſtice, but he ought to ſtop there; that any proceeding further, and ſo procuring injuſtice to the other ſide, was utterly unjuſtifiable; and that if there was no caſe to ſupport ſuch apportionment, the verdict was againſt law." He adds, that the direction of the court was in that caſe in favour of the defendant, and that the jury was guided by the counſel and not by the court.

But the law is now underſtood to be according to the verdict, and certainly that is conformable to the real intention of the parties; nevertheleſs it is regarded as a ſpecial and excepted caſe, and in the caſe next to be cited, the right of a common hired ſervant having been adduced by way of argument, Mr. Juſtice *Lawrence* ſaid, that ſuch a ſervant, though hired in a general way, is conſidered to be hired with reference to the general underſtanding upon the ſubject, that the ſervant ſhall be entitled to his wages for the time he ſerves, though he do not continue in the ſervice during a whole year.

The caſe referred to, was an action by the perſonal repreſentative of a ſeaman, who had ſailed from *Jamaica* upon an undertaking,

taking, to pay him 30*l.* provided he continued on board, and did his duty until the arrival of the ſhip at *Liverpool*. He having died upon his paſſage, it was held that his repreſentative could not recover a proportionable part of the wages, on a *quantum meruit* for work and labour. It appeared, that if there had been no ſpecial contract, the wages due for the voyage upon a *quantum meruit*, would have only been about 8*l.* And Lord *Kenyon* obſerved, that he ſtipulated to receive the larger ſum if the whole duty were performed; and nothing unleſs the whole of that duty were performed; it was a kind of inſurance. Mr Juſtice *Lawrence* ſaid, If we are to determine this caſe according to the terms of the inſtrument alone, the plaintiff is not entitled to recover, becauſe it is an entire contract. *Cutler* v. *Powell*, 6. *T. R.* 320.

In *Cook* v. *Jennings*, 7 *T. R.* 381. it was agreed by charter-party to pay freight at the rate of ſeven pounds *per* ſtandard hundred, for deals delivered at *Liverpool*. The ſhip before her arrival was wrecked, and became incapable of proceeding on her voyage, and the deals were put a-ſhore and taken by the freighter. The owner claimed a proportionate part of the freight; but it was ruled that he could not enforce payment of any part of the money under the contract, not having carried the goods to *Liverpool*, and the defendant having only agreed to pay on a delivery at *Liverpool*.

In a much older caſe, which was cited in the preceding, a merchant covenanted with the maſter of a veſſel, that if he would bring his freight to ſuch a port he would pay him ſuch a ſum; and the maſter ſhowed that part of the goods were taken away by pirates, and the reſidue brought to the place appointed; and the court were of opinion that the merchant was not to pay the money. *Bright* v. *Cowper*, *Brownlow*, 21.

Mr. *Abbot* obſerves, that upon reading this report it is not quite clear what the real queſtion before the court was; but it ſeems that the plaintiff claimed his whole freight, to which it might be very properly held he was not entitled, as he had not performed the whole contract; if he claimed a part only of the freight, and was held by the court not to be entitled to any thing, it may be that, by the particular terms of the contract, the payment of freight was made to depend upon the delivery of the entire cargo.

Conciſe as the report is, I cannot think it imperfect, for it appears to be decided merely upon the plaintiff's allegation, without reference to any queſtion dependent upon a further view of the ſubject; it is not hinted that any thing turned upon the mode or form of the allegation. According to the common courſe of declaring, it would be ſtated that the defendant had not paid the money, or any part of it, and I rather think that upon ſuch an allegation, the court would hold the declaration to be ſufficient

to

to entitle the plaintiff to a verdict *pro rata*, provided he was ſo entitled by virtue of the contract itſelf. In the deciſion, that he was not entitled to any thing, though the caſe is attended with hardſhip, there appears to be nothing inconſiſtent with the general doctrine of apportionment.

There are however ſeveral caſes, in which it has been held that if a ſhip breaks ground, and is afterwards incapacitated from the performance of the voyage, there being no ſpecial contract or undertaking, freight is due *per rata itineris*, but there are alſo authorities which import that in caſe of ſuch inability, the maſter has by the marine law a right to refit his ſhip, or engage another, which implies an obligation on his part to do ſo, if required by the ſhipper, before he can found any demand upon the agreement. For the caſes upon the ſubject, ſee Mr. *Abbott*'s Treatiſe on the Law of Shipping, Part iii. chap. 7. But certainly any rule, that a perſon undertaking to carry goods to a certain port, to be paid an entire freight upon the delivery of them, ſhall be entitled to a proportion of the freight, from whatever cauſe they are not delivered, except a prevention by the act of the party who is to pay, is in oppoſition to the general principle of the *Engliſh* law, that an entire contract cannot be apportioned.

As to the apportionment of rent in a leaſe, where a tenant is evicted of part, and the diſtinction between the actions of debt and of covenant, and the caſe of the original leſſee and an aſſignee. See the caſe of *Stevenſon* v. *Lombard*, 2 *Eaſt*, 575.

At common law, if a tenant for life made a leaſe, and died before the rent day, the rent was loſt, and the tenant had the enjoyment without making any compenſation; but by ſtatute 11 *G.* 2. *c.* 19. if the tenant for life die before the rent from his ſubleſſee becomes due, upon any lands held for his life, his executors are entitled to recover a rateable proportion for the time that ſuch tenant lived. It is to be obſerved, that this act ſtops ſhort of its probable object, in not including the caſe of a tenant for the life of another perſon whoſe eſtate determines by the death of ſuch other perſon. If an eccleſiaſtical perſon makes a leaſe and vacates his preferment by the acceptance of another, I conceive that there can be no apportionment. The equity of the ſtatute, 11 *G.* 2. is held to extend to tenants in tail. *Pagett* v. *George*, *Ambler*, 198. 2 *Bro. Ch.* 659.

Where a ſettlement is made to a perſon for life, with remainder over, and with power to make leaſes, and a leaſe is made conformable to the power, the rent is not to be apportioned, but belongs to the remainder man. *Prec. ch.* 555. 1 *P. Williams*, 177. There are ſeveral caſes in which it has been held, with reſpect to money

invested in the funds, that the dividends are not apportionable, but go to the party entitled in remainder. 3 *Atk.* 260. 582. 2 *Ves.* 672. 3 *Bro. Ch.* 99.

Wherever an annuity is left payable at certain times, it seems clear that there can be claim to an apportionment; but where a person is entitled to interest of money on a mortgage or other security, the interest becomes due from day to day, and is to be apportioned. *Edwards* v. Countess of *Warwick*, 2 *P. Williams* 171.

In some cases, if money is paid upon consideration of a contract which fails, the right of a total or partial return depends upon the *entirety* of the contract as connected with the total or partial failure.

This may be illustrated by the common obligation to return the premium of a policy of insurance, if the risk does not attach. Thus, where a ship was insured for a year against capture only, and was lost by the perils of the sea in a month, it was held that the assured had not any right to a proportionate return of premium for the time unexpired; it being an entire contract for a gross sum. *Tyrie* v. *Fletcher*, *Cowp.* 666. *Loraine* v. *Thomlinson*, *Doug.* 585. So when an insurance was made at and from *Harfleur* to *Angola*, at and from *Angola* to *St. Domingo*, at and from *St. Domingo*, to *Harfleur*; after a deviation which rendered the policy void, the vessel was lost between *Angola* and *St. Domingo*, this was held to be an entire risk, and nothing was due by way of return upon the proportion between *St. Domingo* and *Harfleur*.

But where a divisibility in the object of the contract can be implied, the consideration may be apportioned; as where a vessel was insured from *London* to *Halifax*, warranted to depart with convoy from *Spithead*, and the convoy had sailed from *Spithead* before her arrival, it was held that there was a right to demand a return of premium, making a deduction for the risk from *London* to *Spithead*, but there was a usage of trade in favour of this decision, and the risks to and from *Spithead* were considered as distinct. *Stevenson* v. *Snow*, 3 *Bur.* 1237. The cases of *Meyer* v. *Gregson*, *Park.* 389. *Long* v. *Allen*, *Park*, 390. *Rothwell* v. *Cooke*, 1 *B.* & *P.* 172. also relate to this subject, but a more particular detail of them would be foreign to the present purpose.

The following observations have already been laid before the public, in an Essay on the action for money had and received.

"In a case which arose early in the 18th century, the Court of Chancery decreed one hundred guineas, as part of an apprentice fee, to be paid back to the father of the apprentice, his master having died within three weeks after the sealing of the articles,

though it was expreſsly provided by the articles, that if the maſter ſhould die within the year, only ſixty pounds ſhould be returned. *Vern.* 460. Lord *Kenyon*, when Maſter of the Rolls, obſerved that this deciſion carried the authority of the court as far as could be. 3 *Bro. Ch. Rep.* 480. And Mr. *Fonblanque* obſerves, that if it be a rule of equity, as in many caſes it is ſtated to be, that equity will not alter or extend the agreement of the parties; the decree ſeems irreconcileable with ſuch rule. *B.* 1. *c.* 5. *f.* 8. A ſuit in equity muſt, in reſpect to this ſubject, be conſidered as being merely equivalent to an action for money had and received, and there can be no pretence for referring the decree to any other principle than that of money paid upon a conſideration which has happened to fail; and the court, in decreeing the apprentice-fee to be refunded, ſeems to have thought the conſideration for which it was given, was the entire performance of the articles, whereas it was the fact of contracting the relation, and the entering into conſequent engagements. In that view, the conſideration was complete and entire, and could not partially fail. I much doubt whether the precedent would now be followed, but think it certainly would not be allowed by analogy to govern any other caſe.

There are ſome caſes in which courts of equity will relieve againſt the ſtrict neceſſity of performing the whole of an agreement, where a ſufficient compenſation can be made. Thus, where an agreement is made for the ſale of an eſtate as free from incumbrances, which appears to be ſubject to a ſmall quit rent, the performance of the agreement may be enforced, making a proportionate deduction from the purchaſe money. So where it appears that there is a want of title to a ſmall part of the property purchaſed, *Calcraft* v. *Roebuck*, 1 *Veſ. Jun.* 221, or where there is a ſlight and immaterial lapſe of time (*a*). *Ormrod* v. *Hardman*, 5 *Veſ.* 722. 732. But I cannot, from any printed authorities which I have met with, give a diſtinct ſtatement of the extent to which this principle, which is familiar in practice, is applied. It may often be extremely difficult to aſcertain the materiality of a particular circumſtance as connected with the object and views of a contracting party; and perhaps it may be found that the leſs deviation is allowed from the ſtrict and literal execution of a condition required by the common law, and the leſs latitude is aſſumed of introducing an exception referable to no accurate ſtandard or criterion, the more extenſively will the general purpoſes of diſtributive juſtice be accompliſhed.

(*a*) Courts of equity formerly carried the principle of giving relief againſt lapſe of time to a very great extent, but this has been corrected by the modern caſes of *Lloyd* v. *Collier*, 4 *Bro. Ch. Rep.* 469. 4 *Veſ.* 689. *Ferrers* v. *Rhuvet*, 4 *Veſ.* 492.

A cauſe is often mentioned, of which I do not recollect to have ever ſeen a full account in any profeſſional publication, but which Lord *Kenyon* has referred to at niſi prius. Where it appeared that a perſon had agreed for the purchaſe of an eſtate, having a wharf adjoining to a navigable river, principally with a view to the benefit of the wharf, and there being no title to the wharf, he was compelled to take the purchaſe of the reſt of the eſtate. His lordſhip ſaid, that he heard the deciſion pronounced when he was a young man; that he thought it an abominable deciſion at the time, and he continued to think ſo ſtill. An opinion in which the preſent editor moſt unequivocally accords.

And in a caſe which has occurred ſince writing the preceding remarks, Lord Ch. *Eldon* ſaid, it was certainly to be obſerved, that under the head of ſpecific performance, contracts, ſubſtantially different from thoſe entered into, have been enforced. In the caſe of a contract for a houſe and wharf, the object of the purchaſer being to carry on his buſineſs at the wharf, it was conſidered that this court was ſpecifically performing that man's contract by giving him the houſe without the wharf. *Vi. Drewe* v. *Hanſon*, 6 *Veſ.* 675, and the caſes there cited.

NUMBER IX.

(Referred to, Vol. I. p. 134.)

Of the Computation of Time.

This ſeems to be the moſt favourable opportunity for preſenting the following particulars reſpecting the rules adopted in the law of England as to the computation of time.

The expreſſion *from ſuch a day* may, as the law is now ſettled, be conſtrued excluſively, or incluſively, as may be beſt adapted to the intention of the parties, and the ſubject matter of the contract. Accordingly, where a leaſe was made for twenty-one years from the day of the date, which would have been void if conſtrued excluſively, it was held to mean incluſively. *Pugh* v. Duke of *Leeds*, *Cowp.* 714. But the propriety of this determination, and its conſiſtency with former authorities, has been very ably aſſailed by Mr. *Powell*, in his Treatiſe on Powers. If there is nothing in the nature of the contract which particularly affects the conſtruction, I apprehend it to be clear that the term is to be conſtrued excluſively. And if an act was to be done within one year *from the thirty-firſt of December* 1799, the term would elapſe on the 31ſt *Dec.* 1800. *Anon.* 1 Lord *Raym.* 180. But if the day is not mentioned, or referred to, and the promiſe is to be performed within a year, the firſt day is included,

included, and the act muſt be done *before* the recurrence of that day in the following year.

It is laid down, that where the computation is to be made from an act done, the day when ſuch act was done is included; accordingly, it has been held, that where a bill was payable at a certain period after ſight, where an action was to be commenced againſt the hundred within one year after a robbery, or a ſheriff was excuſed from returning a writ unleſs ruled to do ſo within ſix months after going out of office, the day of preſenting the bill, of the robbery, and of going out of office, were included. *Vi.* the *King* v. *Adderley*. *Doug.* 463, and the caſes there cited. Alſo, where an action was not to be brought until one calendar month next after notice, the day of giving notice was held incluſive, and the notice having been given on the 28th of *April*, the action was not commenced too ſoon on the 28th of *May*. *Caſtle* v. *Burditt*, 3 *T. R.* 623. And it is a general rule, that one day is to be taken incluſively, and the other excluſively.

Our law has for many purpoſes introduced the term of a year and a day, which includes the recurrence of the ſame day in the ſubſequent year.

The law makes no fraction of a day, and upon this principle it has been held, that a perſon born at any time on the 1ſt *January*, 1780, is of age on the 31ſt *December*, 1800. *Herbert* v. *Tarbol.* *Keb.* 589. *Sid.* 162. *Raym.* 84. cited 1 Lord *Raym.* 480. 2 *ditto*, 1094. 3 *Wilſ.* 274. But where different acts or occurrences take place on the ſame day, the priority of which it is material to diſtinguiſh, the rule does not apply: where the heir ſtated himſelf to be entitled on the ſame day that his anceſtor died, it was contended that in fiction of law the anceſtor was alive the whole of that day, and therefore the title of the heir did not commence until the day following. But it was truly anſwered by the court of Common Pleas, that if my anceſtor die at five o'clock in the morning, I enter at ſix, and make a leaſe at ſeven, it is a good leaſe: there being no fraction of a day is a fiction of law, which ought not to be allowed, and this is ſeen in all matters where the law operates by relation and diviſion of an inſtant, which are fictions of law [of which ſeveral caſes are cited.] By fiction in law, the whole term, the whole time of the aſſizes, and the whole ſeſſion of parliament, may be and are ſometimes conſidered as one day, yet the matter of fact ſhall overturn the fiction, in order to do juſtice between the parties. *Rex* v. *Herſey*. 3 *Wils*, 274. And by Lord *Mansfield*, *Combe* v. *Pitt*, 3 *Bur.* 1423: though the law in general does not allow the fraction of a day, yet it admits it in caſes where it is neceſſary to diſtinguiſh, and I do not ſee why the very hour may not be ſo too,

where it is neceſſary, and can be done; for it is not like a mathematical point, which cannot be divided.

In ſome other ſpecial caſes the rule of there being no fraction of a day, does not apply. The *ſtat.* 26 *G.* 3. *c.* 39. *ſ.* 30. 35, directs, that the permits for the removal of wine ſhall expreſs the time within which it ſhall be removed from one ſtock, and received into the other. A permit was granted at nine o'clock in the morning of the 18th *July*, to be in force for one hour for the removal, and two days more for the delivery, and it was held that the two days expired at 10 o'clock on the morning of the 20th. *Cooke* v. *Sholl*, 5 *T. R.* 255.

A month is in general conſtrued as a lunar month of twenty-eight days, but a calendar month may be underſtood from the nature of any particular tranſaction, and the common courſe of buſineſs, as in caſe of bills of exchange. In eccleſiaſtical proceedings, the computation is by calendar months; twelve months are only twelve lunar months, but the aggregate denomination, a twelvemonth, is ſynonymous with a year.

NUMBER X.

(Referred to, Vol. I. p. 136.)

Of Alternative Obligations.

In the caſe of *Layton* v. *Pierce*, *Doug.* 14, which was an action for a penalty upon an illegal inſurance in the lottery, it appeared that the inſurer engaged upon a certain event to pay 20*l.* or an undrawn ticket, and it was ſaid by Lord *Mansfield*, that though the practice may be that the inſured ſhall have the option, in point of law, the perſon who is to perform one of two things, in the alternative, has the right to elect, and that this had been eſtabliſhed in many caſes.

The declaration in that caſe, which was an action for the penalty incurred by the inſurance, having ſtated in one count the contract as for paying 20*l.* and in another, as for giving an undrawn ticket without ſtating it alternatively agreeably to the fact, this was ruled to be a fatal variance, which was the principal point in the caſe.

There is a caſe in which a huſband gave a bond, that in caſe he ſold certain lands of his wife, he would in his life-time purchaſe lands of equal value for her and her heirs, or elſe ſhould leave her as his executrix, or by legacy, or otherwiſe, as much money as he had received by the ſale. The ſale having taken place, the wife died firſt, and afterwards the huſband died, not having made the purchaſe, and it was held that the bond was diſcharged, and according

cording to Lord *Coke*'s report, the reaſon of the judgment was, that where the condition of an obligation conſiſts of two parts in the disjunctive, and one of them becomes impoſſible by the act of God, the obligor is not bound to perform the other part; for the condition is for the benefit of the obligor, and ſhall be conſtrued moſt beneficially for him, and he had an election to perform the one part or the other to ſerve the penalty of the obligation, and when one part became impoſſible by the act of God, it ſhall be as beneficial to him as if that ſeparate part had been the ſole condition of the obligation, and ſo when that part becomes impoſſible by the act of God, ſo that it could not by any induſtry be performed, the obligation is ſaved, although he does not perform the other. *Laughter*'s caſe, 5. *c.* 21. *Cro. Eliz.* 716. 814. *Moor*, 645.

But in the caſe of *Studholme* v. *Mandell*, 1 Lord *Raymond*, 279, where the defendant covenanted to leave the ſtones of a mill in as good condition as he found them, or pay the plaintiff as much as they ſhould be damnified, the damage to be eſtimated by A and B, who viewed them when the defendant entered them, and gave a bond for the performance of the covenants; the plaintiff brought an action on the bond (*a*), and aſſigned for breach that the defendant had left the mill-ſtones damnified, and had not made ſatisfaction. To which the defendant pleaded, that A and B had not eſtimated the damage, and upon demurrer it was argued for the defendant, that this was a condition disjunctive, and therefore the leaving the mill-ſtones damnified, would not be a breach, becauſe at the time of the covenant he had election to perform the one or the other part; therefore, according to *Laughter*'s caſe, without eſtimation by A and B of the damage, the defendant was excuſed from the performance, becauſe it was impoſſible for him to make the adjudication, or to compel A and B to do it, and till that was done, the defendant could not be liable, no more than if A enters into a bond to perform the award of B and C, and B and C will not make any award. To this it was anſwered, that theſe covenants were part of the condition of the bond, and ſince the latter part of the disjunctive covenant was for the ſafety of the defendant, it belonged to him to procure this eſtimation, or otherwiſe he ſhould be liable, and of this opinion was the whole court, and they ſaid that the rule and reaſon of *Laughter*'s caſe ought not to be taken ſo largely as *Coke* had reported it, but according to the nature of the caſe. And *Treby*, C. J. put this caſe: A, in conſideration of 100*l.* bound himſelf in a bond with condition to make a leaſe for

(*a*) The report ſtates this to be an action of covenant, but from the context of the caſe, and the pleadings which are contained in 3d Lord *Raymond*, 186, it appears, as above ſtated, to be an action on the bond.

the life of the obligee before ſuch a day, or to pay him 100*l.*; the obligee died before the day; yet in the time when *St. John* was Ch. J. of the Common Pleas, it was adjudged that the obligor ſhould pay the hundred pounds, and *St. John* then declared, that he well knew ſome of the judges who gave the reſolution in *Laughter*'s caſe, and that they denied that they laid down ſuch a rule as *Coke* had reported: yet the whole court held that the principal caſe of *Laughter* was good law. The reporter, Lord *Raymond*, obſerves by way of note, that the laſt caſe put by *Treby* ſeems to be indiſtinguiſhable in reaſon from *Laughter*'s caſe. It has been ſuggeſted, (3 *Mod.* 233) that the intent in *Laughter*'s caſe was to provide a ſecurity for the wife, ſo that ſhe dying before the huſband, the non-performance could hurt nobody, there being no neceſſity that any thing ſhould be done in order to it after her deceaſe; this reaſon would reduce *Laughter*'s caſe (I conceive with juſtice) to a point of conſtruction upon an implied condition, that the wife ſhould ſurvive the huſband.

But it has been held in many caſes, that where there are two acts in the alternative and in the election of the obligor, (or perſon who is to perform them) and one is prevented by the act or fault of the obligee, the law diſcharges the obligor from the other, as the benefit of election ſhall not be taken from the obligor by the act of the obligee.

The caſes are collected in *Viner*'s Abridgement, vol. 5, 210. In the moſt recent there was a bond, with condition to ſettle on the obligee, *within ſix months, as his counſel ſhould adviſe*, an annuity of 20*l.* for life, or to pay within ſix months, 300*l.* the obligor pleaded, that the obligee had not tendered any grant of an annuity within the ſix months, and it was adjudged to be a good defence.

But though the general principle is founded in juſtice, and in the caſe cited there was a good legal defence, a court of equity, ſo far as regarded the performance of an agreement, (and relieving from all penalties of non-performance) would in this, as in other caſes, diſpenſe with an abſolute ſtrictneſs in point of time, and compel the obligor at his own election to ſettle the annuity, or pay the money.

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NUMBER XI.

(Referred to, Vol. I. p. 145.)

Of Joint and Several Obligations.

§ I. *In Favour of ſeveral Perſons.*

Obligations in ſolido, between ſeveral creditors, which *Pothier* mentions as being very rare in *France*, are I conceive wholly unknown to the law of *England*. An obligation may be joint, in which caſe all the perſons, in whoſe favour it is contracted, muſt join in an action founded upon it; or it may be ſeveral, in which caſe each muſt bring a ſeparate action with reference to his own ſeparate intereſt: or perhaps, where the intereſt in a ſubject is joint, an engagement may be ſpecially framed, enabling them to proceed either jointly or ſeparately at their diſcretion. If one contract was made with ſeveral perſons, indicating a right in each to make a claim for the whole, it ſeems that the operation of it would, notwithſtanding theſe expreſſions, be that of a joint obligation.

I do not ſee any legal incompetence in the giving ſeparate engagements to each of two joint creditors, with a condition, that a payment to one ſhould operate as a diſcharge from the claim of the other; in which caſe, the effect of the two engagements would only conſtitute one obligation, nearly ſimilar in its nature to the obligation in ſolido; but I am not aware of any inſtance of ſuch engagements having been the ſubject of judicial attention, and I am not prepared to ſtate how far the legal conſequences ariſing from any ſuch, which might occur, would coincide with thoſe which are ſtated by *Pothier*, as applicable to obligations in ſolido.

Inſtances are not unfrequent of diſpoſitions with a diſcretionary power, in reſpect of the objects in whoſe favour they are to be executed, but theſe are not accompanied by the effects aſcribed by *Pothier*, to obligations in ſolido; it is not competent to any of the objects, to enforce an excluſive claim in their own favour by priority of demand; the perſon charged with the obligation can be compelled to execute it in favour of ſome of the objects, ſubject however to the diſcretion originally intended; but the courts will take care to guard againſt ſuch diſcretion being perverted into an abuſe.

In caſes of contracts with factors, a right of action may be maintained, either on the behalf of the factor or his principal, and a payment to either will be a ſufficient diſcharge, except in caſes where

the factor has a lien on the debt, on account of his demands againſt the principal. An obligation thus contracted, has in many of its effects a reſemblance to an obligation in ſolido, but is ſpecifically diſtinct from it, and is not intended at preſent to be the ſubject of particular examination, although I have thought it proper to allude to it.

The general poſition of *Pothier*, that regularly when a perſon contracts an obligation of one and the ſame thing, in favour of ſeveral others, each of them is only creditor for his own ſhare, is the direct reverſe of that which it ſeems proper to ſtate, as applicable to the *Engliſh* law, by which a general obligation in favour of ſeveral perſons, is a joint obligation to them all, unleſs the nature of the ſubject, or the particularity of the expreſſions leads to a different concluſion; and even where the expreſſions appear to denote a ſeparate obligation to each, the legal effect has been held to be a joint obligation in favour of all; in which caſe an action can only be maintained by them jointly during their joint lives; after the death of any, the right accrues to the ſurvivors, and finally to the repreſentatives of the laſt ſurvivor, ſo far as reſpects the enforcing the claim againſt the oppoſite party. The conſequent obligations which may reſult between the ſurvivors and the repreſentatives of the deceaſed, is a different ſubject of conſideration.

In caſe of partners in trade, the right is exerciſed by the ſurvivors for the benefit of themſelves, and the repreſentatives of the deceaſed: in other caſes not attended with any ſpecial circumſtances, I apprehend it may be ſtated as the general rule, that the beneficial right, as well as the legal power of enforcing redreſs, devolves upon the ſurvivors.

In *Slingsby*'s caſe, 5 *Co.* 18. *Beckwith* covenanted with *Ravafour*, *Slingsby*, and *Harvey*, *and with each*, *and every of them*, that he had a lawful title to certain premiſes, and an action having been brought by *Slingsby* alone, it was held that it was not maintainable, for that the other covenantees ought to have joined, and this notwithſtanding the words, *with each and every of them*; as to which this diverſity was agreed, that where it appears by the declaration, that each of the covenantees has, or is to have a ſeveral intereſt or eſtate, and a covenant is made with them, and with each of them; the words *with each of them*, make the covenant ſeveral in reſpect of their ſeveral intereſt, as if a man demiſes black acre to A, and white acre to B, and green acre to C, and covenants with them and each of them, that he is the lawful owner of all the ſaid premiſes, the covenant is ſeveral. But if he demiſes the ſaid acres to them jointly, then the words *with each of them*, are void; for a man cannot by his covenant, (except in reſpect of ſeveral intereſts,

tereſts) make it in the firſt place joint, and then by the addition of theſe words make it ſeveral. For however perſons may bind themſelves, and each of them, ſo that the obligation will be joint or ſeveral at the election of the obligee, no man can bind himſelf to three and each of them, ſo as to make this joint or ſeveral, at the election of ſeveral perſons for one cauſe: for the court would be uncertain for which of them to give judgment, which the law will not allow as was holden, in 3 *H.* 6. 44. where a perſon brought a replevin againſt two for one beaſt, and they made ſeveral avowries, each in his own right; and by the advice of all the judges, both the avowries were abated for the inconvenience, that if both the iſſues ſhould be found for the avowants, the court could not give judgment to them ſeverally for the ſame thing. So, the covenantor in the principal caſe would be twice charged with the ſame thing, and therefore the words *with each of them*, are only an amplification and redundancy, and cannot ſever the joint cauſe of action. It was alſo reſolved, that an intereſt cannot be granted jointly and ſeverally; as if a man grant the next advowſon, or make a leaſe to two jointly and ſeverally, the words *and ſeverally*, are void, and they are jointly intitled. So, if a man makes a feoffment in fee to three, and warrants the land to them, and each of them, this warranty is joint, and not ſeveral; but in ſuch a caſe, if their eſtates were ſeveral, their warranty would be ſeveral accordingly.

And in a recent caſe, where *Martindale* covenanted with *Anderſon*, his executors, adminiſtrators, and aſſigns, and alſo with *Wyatt*, and her aſſigns, that he would pay an annuity to *Anderſon*, during the life of *Wyatt*; it was held that the covenant was joint, and that, *Wyatt* having ſurvived, the action ought to be brought by her, and could not be brought by the repreſentatives of *Anderſon*. Lord *Kenyon* ſaid, that it had been aſſumed in the argument, that each of the covenantees had different intereſts; but that was not ſo, for the covenant was to each of them for the ſame thing, and though the benefit were only to one of them, yet both had a legal intereſt in the performance of it, and therefore the legal intereſt being joint during the lives of both, on the death of one it ſurvived to the other. *If indeed the covenant had been to each by two different deeds, though for the ſame duty* (*a*), there could not have been a joinder in action: but here the parties claim by the ſame title, and therefore the law coincides with the juſtice and convenience of the caſe. *Anderſon* v. *Martindale.* 1 *Eaſt.* 497.

(*a*) This would conſtitute a real obligation in ſolido, as deſcribed by *Pothier.*

Another ſtrong inſtance of perſons having a joint legal intereſt, although for the benefit of one of them ſeparately, occurred in the caſe of *Scott* v. *Goodwin*, 1 *Bof. & P.* 67. The defendant, as tenant, covenanted with *Grice* his landlord, his heirs and aſſigns; and the premiſes having been conveyed to *John Scott* the plaintiff, and *Robert Scott* (but as to the eſtate of *Robert* in truſt for *John*) it was held that *John* could not alone maintain an action on the covenant. And Lord Chief Juſtice *Eyre* ſaid, that as the operation of law upon the deeds, was to conſtitute *John* and *Robert* joint aſſignees, the effect of it was that the defendant's covenants became alſo, by operation of law, contracts with *John* and *Robert* jointly. "There is an eſſential difference between the caſes, where the objection is that other perſons ought to be made co-defendants, and where it is that there are not the proper parties plaintiffs in the ſuit. Many plaintiffs can have but one right, having but one intereſt, and one cauſe of action, which ought to be, and is, indiviſible, admitting of but one ſatisfaction. But if in the nature of the thing, if on principles of law or authorities, it could be; that a man ſhould derive a ſeveral intereſt, out of a joint obligation to himſelf and others, and that plaintiffs could ſue ſeparately for their portions of one right, it is moſt obvious that it muſt vex and haraſs defendants extremely. I take it to have been ſolemnly adjudged in ſeveral caſes, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot ſue alone. A breach of a joint contract with two or more, cannot be joint and ſeveral."

In the preceding caſes, we have ſeen that the courts conſider obligations, which in their expreſſions were ſeveral, to be joint in their effect, on account of the joint intereſt to which they referred.

In *Wyndham*'s caſe, 5. *Co.* 7. it is ſhewn that joint words may by conſtruction of law be taken reſpectively and ſeverally. 1ſt, Sometimes in reſpect of the ſeveral intereſts of the grantors, as if two tenants in common, or ſeveral tenants join in the grant of a rent charge, yet in point of law this grant will be ſeveral, although the words are joint, as Sir *Robert Catlyn*, Chief Juſtice, held in *Browning*'s caſe in *Plowden*. 2d, Sometimes in reſpect of the ſeveral intereſts of the grantees, as 26 *H. c.* 63, 64. a warranty made to two of certain lands, ſhall enure as ſeveral warranties in reſpect that they are ſeverally ſeized, the one of one part of the lands, and the other of the reſidue in ſeveralty. 3d, Sometimes in reſpect that the grant can only take effect at ſeveral times, as in caſe of a remainder being limited to the right heirs of *J. N.* and *J. S.* (*J. N.* and *J. S.* being alive) in which caſe the words are joint,

and

and yet the heirs ſhall take ſeverally, for they ſhall not join in action. 4th, Sometimes in reſpect of the incapacity and impoſſibility of the grantees to take jointly, as a leaſe made to an abbot, and a ſecular perſon, or a grant made to two men, or two women, and the heirs of their two bodies, the inheritance is ſeveral, 7 *H.* 4. 17. 5th, Sometimes in reſpect of the cauſe of the grant, or *ratione ſubjectæ materiæ*, as 15 *H.* 7. 14. where one co-parcener granted a rent to two other co-parceners for equality of partition; although the words are joint, yet the cauſe of the grant will be regarded, and the rent will be of the quality of the land, and therefore they will have the rent in the degree and quality of co-parcenery, and not jointly. And *Knivet*, Chief Juſtice and Chancellor, ſaid, in 38 *Edward*, 3. 26, that if two co-parceners make a feoffment in fee, rendering rent to them and their heirs; the heirs of the one and the other ſhall inherit, for that their right in the land was ſeveral, 22 *E.* 4. 25. & 2. *H.* 3. 18. a joint ſubmiſſion to arbitration was taken ſeverally in reſpect of the ſeveral cauſes.

The caſe of *Eccleſton* verſus *Clipſham*, 1. *Saund.* 153, affords an inſtance of the ſame agreement being conſidered as joint in one part, and ſeveral in another. *Tayler*, *Clipſham*, & *Caſtle*, having contracted with the commiſſioners of prize goods, to buy all prize brandies at a certain rate, they entered into an agreement with each other, by which it was declared that all the parties had an equal intereſt in the contract, and therefore each of them for himſelf, and not for the other, covenanted with the other, and others of them reſpectively, that all prize brandies ſhould be bought by them in partnerſhip upon their joint account, and that none of them ſhould trade in brandy wines by himſelf, or in company with any other, but only on the ſame joint account; that no brandies which ſhould come to the hands of any of the parties, ſhould be ſold by him without the aſſent of the others; that all monies received by any of the partners ſhould be paid by the perſon receiving it, to *Kynton* a Goldſmith, on the joint account that there ſhould be no benefit of ſurvivorſhip, but that the executors of any of the parties who ſhould die, ſhould have the ſame benefit as the party himſelf might have had if living, *and that an account ſhould be given to ſuch executors*, of the brandies and debts due for them, within twenty days after the deceaſe of the party dying. An action being brought by the executors of *Caſtle* againſt *Clipſham*, for ſelling brandies without the aſſent of *Tayler* and *Caſtle*, and for trading on his own account, and for not paying to *Kynton* monies received on the joint account; and for not giving an account to the plaintiffs within twenty days after the death of the teſtator; after judgment by default and entire damages, given upon a writ of enquiry,

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Saunders excepted as to the breaches for the defendants ſelling without aſſent, and trading on his own account, and not paying to *Kynton*, that the covenant was joint with the teſtator, and with *Tayler* who had ſurvived him: for though the covenant be joint and ſeveral by the words, yet the intereſt and cauſe of action in this caſe is joint only, for it is an equal damage to *Caſtle* the teſtator, and to *Tayler*, if the defendant has broken theſe covenants as by the declaration is ſuppoſed, and therefore they ought to have joined in the action; and *Caſtle*, the plaintiff's teſtator, being dead, the action has ſurvived to *Tayler*; as in *Slyngsby*'s caſe above cited. But the covenant, that the defendant would render an account to the executors of the party dying, is a good ſeveral covenant, and well ſuable by the plaintiffs, only becauſe the plaintiffs have a ſeveral intereſt, and cauſe of action in this, but not in the others; upon which objection, and another point not connected with the preſent diſcuſſion, judgment was ſtayed.

A bond to A, and payable, the one moiety to A, and the other moiety to B, is a ſeveral obligation; and the releaſe of one ſhall not prejudice the other, nor can one bar the other of his action. 2. *Sid.* 61. *Mo.* 64.

As the intereſt of tenants in common is ſeveral, though the poſſeſſion is joint, it ſeems clear that a covenant made to them generally, and much more a covenant made with them, and each of them, may be conſtrued as ſeveral; ſo that each may bring an action on account of his own ſeparate damage, and in many caſes they ſeem to have an election to conſider the covenant as joint or ſeveral. In *Martin* v. *Crompe*, 1 Lord *Raymond*, 340. it was ſaid by *Holt*, Chief Juſtice, that if there are two tenants in common of a reverſion, expectant upon a leaſe for years upon which a rent is reſerved, they may join in debt for the rent, or ſever.

In *Harriſon* v. *Barnby*, 5 *T. R.* 246, it was held, that one tenant in common might diſtrain and avow for his moiety of the rent, the defendant having, after notice to the contrary, paid the whole of the rent to the other; and Lord *Kenyon* obſerved, that it was clear, from the authority of *Lyttleton*, that tenants in common ought to avow for their ſeparate portions, though they might join in actions on joint contracts, as in covenant, where the covenant is entered into with both, or in debt for rent, &c. In *Cutting* v. *Derby*, 2 *Bl. Rep.* 1075. it is ſaid by the court, that where one entire injury is done to tenants in common, they ſhall all have one entire remedy, but where the injury is ſeparate, they may have ſeveral actions; and it was there decided, that one tenant in common, might maintain an action againſt a tenant on the *Stat.* 4 *G.* 2. *c.* 28.

c. 28. for his ſhare of double the annual value, againſt a tenant not quitting poſſeſſion.

Where the right of action is joint, as founded on a joint contract, the objection, that it is brought by one of ſeveral who ought to have ſued jointly, or by the executors of a party deceaſed, when it ought to have been brought by the ſurvivor, may be taken advantage of by demurrer, or in arreſt of judgment, or by writ of error, if it appears on the record; and if the contract is alledged as ſeveral, and appears by the evidence to be joint, it is a fatal variance, and the defendant is entitled to a verdict. If two perſons were jointly entitled, the declaration by one muſt ſhew the death of the other, which cannot be preſumed, *Scott* v. *Goodwin*, *ubi. ſupra.* And if an action is brought by the executors of one, it is neceſſary to aver that the teſtator ſurvived the other; it not being requiſite, as it is in the caſe of perſons jointly liable, that the exception ſhould be taken by plea in abatement.

But if one of ſeveral tenants in common, or as it ſhould ſeem, of ſeveral joint tenants, brings an action alone for an injury; it may be objected by plea in abatement, (*a*) but not otherwiſe, that the others ſhould have joined, *Addiſon* v. *Overend*, 6 *T. R.* 766. And if one has ſued alone, and recovered, the defendant, not having availed himſelf of ſuch plea, cannot plead to the action of the ſecond, that the firſt, who has already recovered a ſatisfaction, ought to have joined; and even where there are more than two, Mr. Juſtice *Lawrence* has expreſſed his opinion, that if there had been ſeveral remaining tenants in common, the defendant could never have objected to the ſeverance of the actions, after omitting to plead in abatement in the firſt action. *Sedgeworth* v. *Overend*, 7 *T. R.* 279.

It is clearly eſtabliſhed, and is a neceſſary conſequence of the doctrine involved in ſeveral of the preceding deciſions, that a releaſe of one of ſeveral who are intitled under a joint contract, is a diſcharge from the others, 2 *Rol. abr.* 410, but it ſeems highly reaſonable, that a perſon who has defeated his companions of their right, ſhould be anſwerable to them for the loſs ariſing therefrom.

(*a*) A plea in abatement is that which, without denying that the plaintiff has ſuch a cauſe of action as is alledged, aſſerts that in ſome incidental reſpect the action is improperly brought, and the object of it is not to defeat the claim, but to delay the proſecution of it. The character generally aſcribed to it is, that it muſt give the plaintiff a better writ, but this, although generally, is not univerſally true: for ſometimes the right of delaying the claim by a plea in abatement, is founded on a temporary diſability of the plaintiff to ſue, as that he is an outlaw or an alien enemy. There are ſeveral rules by which theſe pleas are held to much greater ſtrictneſs, than thoſe which go to the merits of the action; but a more particular expoſition of their nature and effects would be foreign to the preſent purpoſe.

For

For the cases in which several persons, having a joint interest, may join in the same action, see Mr. Serjeant *Williams*'s note to *Cayton* v. *Litlebye*, 2 *Saund.* 116.

§ II. *Of Joint and Several Obligations, against several Persons.*

Although the appellation of obligations in solido, is scarcely known to the *English* law, the obligations themselves, as described by *Pothier*, are of not unfrequent occurrence. The most usual instance, is that of a bond or covenant expressed to be made jointly and severally, in which case it is, at the option of the creditor, to proceed against all in one joint action, or in separate actions against each or any of them; but the obligation must be treated as wholly joint, or as wholly separate, for an action cannot be maintained against two or more of a greater number, provided the exception is properly taken, nor can a commission of bankrupt be maintained against two upon a joint debt, or consequently upon a joint and several debt of three. *Vide Allan* v. *Hartley*, *Co. B. L.* 7.

But there are many other cases which fall within the definition of *Pothier*, of an obligation in solido, as contracted by several persons, each of whom is obliged for the whole, but so that a payment made by one liberates the others, as against the creditor.

The most familar instance of this is the case of bills of exchange, with respect to which the drawer, acceptor, and indorsers, are all liable for the whole amount to the holder, and a payment made by any one of them, is as against him a discharge of all the others: and it is only the discharge as against the creditor which is contemplated by *Pothier*, when he speaks of a payment by one liberating the others: the consequent obligation between themselves forming a material part of his discussion.

Two persons, each indebted in a hundred pounds, or jointly indebted in 200*l.* may each give their separate bonds or notes for the whole: two persons may give their separate bonds for the fidelity of a third: two separate policies may be made for the insurance of the same risk: the original landlord or tenant, and their respective assignees, are liable to a covenant founded on privity of estate; and in all these cases the legal effect is that above ascribed to obligations in solido, that each of the parties obliged is liable for the whole claim, but a satisfaction made by any one is as against the creditor a liberation of all the others. But in all these cases the obligation is separate in respect of the right of action; and one joint action cannot be maintained against the drawer and acceptor of a note, against the insurers on two separate policies, against the persons

perſons engaging by two ſeveral bonds or notes, againſt the landlord or tenant, and their reſpective aſſignees.

There is certainly no objection to an obligation in ſolido, being contracted by the different parties in different manners, or by one abſolutely, and the other conditionally. If the caſe of bills of exchange is admitted, as I think upon principle it muſt be, as a legitimate inſtance of an obligation in ſolido, it is alſo an exemplification of this poſition, the acceptor being bound abſolutely and unconditionally, the other parties only ſubject to the obligation upon the condition of due diligence having been uſed by the holder. One perſon may engage to pay within a month, and another within a month following, in caſe of the failure of the firſt; it is the unity of the thing which is to be performed, and the right to demand the performance of it from any one of ſeveral debtors, which conſtitutes the eſſence of this kind of obligation, and which is wholly independent of the mode or form in which the obligation is contracted.

In reſpect to the general conſtruction of contracts, I conceive that the rule of the *Engliſh* law is in reſpect of ſeveral debtors, as well as in reſpect to ſeveral creditors, the reverſe of that ſtated by *Pothier*; and that an obligation contracted generally by ſeveral perſons is a joint obligation, unleſs there is ſomething in the nature of the ſubject to induce a different conſtruction, and render it ſeveral, in reſpect of the ſeparate intereſts of the contracting parties, according to the principles in *Wyndam*'s caſe, which has been already cited, as ſhewing where joint words were to be conſtrued as ſeveral in reſpect of ſeveral creditors.

A joint obligation is eſſentially different from an obligation in ſolido, as the creditor has not a right to proceed againſt each or any of the parties individually, but can only proſecute his claim againſt them jointly. But if a creditor ſues one of ſeveral joint debtors, the objection, that the others ought to be joined, can only be taken by plea in abatement (*a*), and this notwithſtanding it appears by the

(*a*) As to the nature of ſuch plea ſee ante p. 61. *n.* (*a*) Where a commiſſion of bankrupt was taken out againſt two of three joint traders; the other being an infant, it was ruled that it could not be ſupported. It was ſaid in argument, that though it was true that an action might be brought againſt the three partners, including the infant who muſt plead his infancy, yet if the fact was that the whole demand was againſt the three, and the contract of partnerſhip was avoided as to one by his infancy, it remained the contract of the two. The infant having a right to inſiſt that he was not bound by any contract he had made, the demand would be againſt the two in effect, and the infant pleading his infancy, the judgment would be againſt the two in the action. The Lord Chancellor ſaid that the action not only might, but it muſt be imagined, be brought againſt the three. But Mr. Juſtice *Le Blanc*, in a caſe before him in *Bank* at *Lancaſter*, ſummer aſſizes 1799, determined upon demurrer that a replication, ſtating that the partner mentioned in the plea in abatement

the plaintiff's own ſhewing that more are liable (*a*). See *Williams's* note to *Cabell* v. *Vaughan*, 1 *Saund.* 291. If two are ſued upon a joint and ſeveral obligation of three, it ſeems alſo that the exception can only be taken in the ſame manner, though ſome caſes have proceeded upon the contrary doctrine, *id. ibid.* Subject to the right of exception by plea in abatement: I conceive it to be clear that ſeparate actions may be maintained againſt each of ſeveral joint debtors, in like manner as if they were debtors in ſolido (*b*).

One of the inſtances above cited, from *Wyndam's* caſe of joint words inducing a ſeparate obligation, is that of a joint ſubmiſſion to arbitration; but where it is clearly expreſſed that the engagement is joint as well as ſeveral, as (in a caſe already cited upon a former ſubject), where *Burredge* was the preceding, and *Roberts* the ſucceeding tenant to *Manſell*, and by an agreement between *Burredge* of the firſt part, *Roberts* of the ſecond part, and *Manſell* of the third part, the parties agreed to refer all the diſputes reſpecting repairs to *Simcocks*, and *B*, and *R*, *jointly and ſeverally*, promiſed to perform his award, and the arbitrator having directed each of them to pay a certain ſum, they were held to be jointly anſwerable for the whole. Lord *Kenyon* obſerved, that it was rather a hard caſe, and perhaps if it was ſtated to them at the time of the agreement, that each was to become anſwerable for the other, they would have heſitated before they ſigned the agreement, but the words were too ſtrong to be got over.

In a caſe cited in the preceding, H and G covenanted for themſelves and for each of them, to receive the rents due to L, and that

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abatement was an infant, was a good anſwer to the plea, and I think that this was evidently the right deciſion. In caſe an action had been brought againſt the infant and the adult, the defence of infancy need not neceſſarily have been taken by plea, but might have been uſed as a defence at the trial, and then the verdict againſt the other defendant only would have been error on the record. There is certainly no authority to warrant a ſpecial entry, and the giving any effect to the defence of infancy, would be a negation of the joint contract declared upon, as would likewiſe a plea of infancy. This caſe is eſſentially different from thoſe of a plea of bankruptcy, or the proſecution of one defendant to outlawry; for, in both theſe caſes, the whole proceeding is founded upon the ſuppoſition of an original joint contract, although the perſonal exemption of one defendant, in the firſt caſe, exempts him from the liabilty and the outlawry, in the other is an excuſe to the plaintiff for a ſeparate proceeding, but in both caſes a joint original liability is aſſumed, and I conceive muſt neceſſarily be proved; whereas the defence of infancy excludes the ſuppoſition of ſuch joint liability having ever exiſted; and it will be an intolerable hardſhip and a palpable injuſtice, if a plaintiff who ſued the debtor who was adult, ſhould by plea in abatement be compelled to proceed againſt the other, and having done ſo ſhould be defeated, for want of ſubſtantiating that joint contract and joint reſponſibility, which is requiſite to maintain his declaration.

(*a*) The law, as we have ſeen above, is otherwiſe with reſpect to an action by one of ſeveral joint creditors.

(*b*) In all caſes of joint actions, the defendants are ſo far obliged in ſolido, that execution may be levied againſt any of them for the whole.

they

they and each of them would pay the ſame, and it was held that an action might be maintained againſt *H*, for the receipts of *G*. *Lilly* v. *Hodges*, 7 *T. R.* 352.

In a leaſe of a coal-mine to *Errington* and *Ward*, the leſſees covenanted jointly and ſeverally for the payment of the rent, and for the proper working of the mine. After which, there was a covenant by the leſſor to make a certain allowance; it was then agreed, that the leſſees might get inferior coals, paying 15*s.* a ton; and it was further agreed, that an account ſhould be ſettled monthly, and the monies appearing due, paid by *Errington* and *Ward*. An action being brought againſt the executor of *Errington*, for not paying the 15*s.* a ton upon the coal got by *Ward*, and the money due on an account ſettled with *Ward*, after *Errington*'s death, it was contended, that the two later covenants being ſubſequent to the covenant of the leſſor, could not be connected with the preceding, and were therefore not joint and ſeveral, but only joint, and upon which the ſurvivor only was chargeable; but it was held, that the general words introductory to the covenants of the leſſees were ſufficient to extend to all the ſubſequent covenants on their part, unleſs there was ſomething in the nature of the ſubject to reſtrain them. Duke of *Northumberland* v. *Errington*, 5 *T. R.* 522.

Debts contracted by partners in trade are joint debts, for which an action can only be maintained againſt all the partners, or the ſurviving partners jointly, provided the exception is taken by plea in abatement. And if ſeveral perſons jointly engage in a particular purchaſe, it is attended with all the effects of a partnerſhip; but where ſeveral different perſons ſeparately employed a broker to make purchaſes of tea at the *India* Houſe; and the broker, upon payment of the uſual depoſit, took joint warrants for the whole, which he pledged to a banker for monies advanced; it was held, that this did not conſtitute any partnerſhip in the reſpective employers, ſo as to render them liable for the whole loan: the defendants in the particular caſe did not owe any thing in reſpect of their own ſhares: whether the act of the broker would have rendered them liable to the banker for the money borrowed as to their own proportion, was not therefore taken into conſideration. *Hoare* v. *Dawes*, *Doug.* 371. With reſpect to a contract made by one perſon for the purchaſe of goods, and a ſub-contract made by him with others, for taking particular ſhares of them, and which was held not to conſtitute a partnerſhip: ſee *Coope* v. *Eyre*, 1 *H. Bl.* 37.

A creditor upon a joint and ſeveral obligation may, as we have ſeen, elect to conſider the debt as joint or as ſeveral, and may either proceed againſt all the debtors jointly, or againſt each or any of them ſeparately; but it is held that he cannot proceed in both ways

at the ſame time; and that in caſe he does ſo, the pendency of one ſuit may be pleaded in abatement to the other. So, if there are joint and ſeveral eſtates under a commiſſion of bankruptcy, the creditor may take a dividend at his election upon the joint eſtate, or upon each of the ſeparate eſtates, but he cannot have both. *Ex parte Rowlandſon*, 3 *P. Wms.* 405.

But where three perſons were jointly liable as partners, and one of them had likewiſe given his ſeparate bond, it was held that the creditor was entitled to a dividend, both upon the joint eſtate and upon the ſeparate eſtate of the particular obligor. *Ex parte Vaughan*, cited *ibid.*

Where one of ſeveral joint debtors dies, the creditor has only a legal remedy againſt the ſurvivors, and finally againſt the repreſentatives of the laſt ſurvivor; but there are ſeveral caſes in which courts of equity have granted relief upon a joint bond, as if it had been joint and ſeveral, againſt the repreſentatives of the party firſt dying; ſuch being collected from the circumſtances of the caſe to be the intention of the parties, and it being held that the bond was made joint, inſtead of joint and ſeveral by miſtake. See *Primroſe* v. *Bromley*, 1 *Atk.* 89. *Simpſon* v. *Vaughan*, 2 *Atk.* 31.—*Biſhop* v. *Church*, 2 *Veſey*, 100. 371. in which the relief was given againſt the heir. *Burn* v. *Burn*, 3 *Veſ. jun.* 573. in which it was given as upon a ſpecialty to the prejudice of ſimple contract creditors, upon a deficiency of aſſets. But there is no general rule that a creditor has a right in equity againſt the repreſentatives of a joint debtor, who, in conſequence of the ſurvivorſhip of the other, are not liable at law, or that any ſuch right can ariſe in conſequence of the inſolvency of the ſurvivor. See *Home* v. *Contencin*, 1 *Bro. Ch.* 27.

I apprehend it may be ſtated as a general principle, that truſtees, executors and aſſignees of bankrupts, are only chargeable reſpectively with their own acts and receipts; but, in many caſes, their concurrence in the acts of the others renders them perſonally reſponſible; but it is not my intention at preſent to enter into a particular examination of that ſubject.

In caſes of injuries, there is certainly, as in the civil law, a right of action for the whole damage againſt any one of the perſons liable. Sometimes a plaintiff has an election to conſider his demand as founded upon a contract, or upon an injury, in which caſe, if he treats it as a contract, it is ſubject to all the conſequences of a joint cauſe of action, and an exception may be taken by plea in abatement, if he proceeds againſt any of the perſons liable ſeparately. Treating it as an injury, he has the ſame right againſt each ſeparately, as in the caſe of other injuries.

In cases of contracts, if an action is brought against several it cannot be supported against all, it wholly fails, because the tract proved differs from that declared upon; but in actions for injuries, a verdict may be given for some defendants, and against others. And in a very late case, where a declaration stated that three had the loading of a hogshead of treacle, for a reasonable reward, to be paid by the plaintiff, and that they conducted themselves so negligently and unskilfully, that the treacle was lost; it was held, that the action being founded on a neglect of duty, and not upon a breach of promise, the acquital of one defendant did not affect the plaintiff's right to have his judgment upon the verdict against the others. *Govett* v. *Radnidge*. 3 *East*, 62.

Where an obligation entered into by several persons, in one instrument, is merely several, so that each of them is only answerable for his respective share, the obligation has no other effects than if it consisted of so many distinct contracts perfectly separate from each other.

In the *English* as in the civil law, the pursuit of one or more of several debtors, who are each respectively liable for the whole, does not affect or prejudice the right against the others, which continues entire, until the creditor has obtained an actual satisfaction for his demand.

Where there is a joint and several engagement, an acknowledgement by one of the debtors is sufficient to take the case out of the statute of limitations as against the others, and is regarded as an acknowledgement by themselves. *Whitcomb* v. *Whiting*, *Doug.* 651. and even a payment of a dividend by the assignees of one of the makers of a joint and several promissory note, who had become bankrupt, was held to take the case out of the statute as against the other. *Jackson* v. *Fairbank*, *H. B.* 340, which was certainly going a great way indeed. In both these cases the action was brought separately against the party, who had not made the acknowledgement. But where the engagement of two persons is made by separate instruments, and arises from separate contracts made with each, I do not conceive that any act by the one can increase or continue the obligation of the other. The argument that one person would derive a benefit from the payment of another, and that therefore he ought *e converso* to be charged by his acknowledgements, is often more plausible than correct; for the liberation, in the one case, is founded upon the general principle of equity, which does not allow a person to receive more than one satisfaction for the same duty, though he may have many ways of enforcing the performance of that duty; whereas no man ought to be charged by any contract with a greater obligation than he personally intended

to ſubject himſelf to. I alſo take it to be clear, that the commencement of an action againſt one debtor, upon a joint and ſeveral engagement, is not available againſt the others, as a proceeding within the time of limitation.

I am not aware of any authority, that if one debtor has actually ſet off a ſeparate debt of his own againſt a joint and ſeveral debt of himſelf and others, that this could be taken advantage of by the others, in any action inſtituted againſt them; although it is certainly reaſonable, that ſuch a ſet-off ſhould in all reſpects be regarded as a payment, and this obſervation applies more forcibly to the caſe where the creditor has ſet off the joint and ſeveral debt againſt a demand due from himſelf to one of the debtors. It is quite certain that one of the debtors cannot in other caſes take advantage in a ſuit againſt himſelf, of a debt owing from the creditor to any of the others.

It has long been ſettled, that if two perſons are bound jointly and ſeverally, a releaſe to one is a diſcharge to all (*a*); and this rule applies

(*a*) The following note, by Lord *Nottingham*, upon the ſubject, is inſerted in *M. Hargreave's* edition of *Co. Lit.* 232. *a.*—26 *H* 6. *T. Barre*, 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a good plea in bar. Note. Each was bound in the entirety, therefore it was joint and ſeveral. 34 *H.* 6. So in the caſe of the *King*, if he releaſes to one of the obligors, the other ſhall take advantage. 5 *Rep.* 56. *contra*. And as a releaſe in deed to one obligor diſcharges the other, ſo of a releaſe in law, as 8 *Rep.* 136. *Newſham's* caſe. A woman obligee marries the obligor, that is another ſort of diſcharge, 264, *b* *. But 17 *Car. B. R.* two were bound jointly and ſeverally. The plaintiff ſued both, and afterwards entered a *retraxit* againſt one; whether that diſcharged the other was the queſtion; *Berkely* ſaid it was, for it amounts to a releaſe in law, as the plaintiff confeſſes thereby, that he had not cauſe of action, and therefore he cannot have judgment, as in *Hickmot's* caſe, 9 *Rep.* and *retraxit* is a bar to an action; and the plaintiff, by his own act, has altered the deed from joint to ſeveral, and therefore the other ſhall have advantage of it. *Croke Juſt. contra*; for a *retraxit* is only in the nature of an eſtoppell, and therefore, the other ſhall not have advantage; neither is it a releaſe, though it be in the nature of a releaſe; and if the obligee ſues both, and then covenants with one not to ſue further, that is in the nature of a releaſe, but the other ſhall not take advantage of it; and in 21 *H.* 6, it is ſaid, that there muſt be an actual releaſe to one obligor, to diſcharge the other. See *March Rep.* 165. *Paſ.* 18 *Car. Hannau* v. *Roll.* The obligee releaſes to one obligor; the other, in conſideration of the forbearance, undertakes to pay; and in an action upon the caſe, the matter was found ſpecially,

* In *Wankford* v. *Wankford*, 1 *Salk.* 299. it was ruled, that if the creditor makes one of two joint debtors his executor, the debt is extinguiſhed at law, and there can never be any legal remedy againſt the other; but in *Errington* and *Evans*, 2 *Dickins*, 457, Lord *Thurlow*, with a due regard to the principles of equity and juſtice, ſaid, that where the obligee makes one of the obligors executors, and takes no notice of the bond, but deviſes the reſidue of the eſtate to others, he was clear it was not an extinguiſhment of the debt, though at law it would be ſo, and he decreed accordingly.

Where one of two joint debtors marries the creditor, or one of two joint creditors marries the debtor, nothing can be more obvious, than that in juſtice and equity relief ſhould be given againſt or for the other in reſpect of his proportion.

applies in equity as well as at law. *Bower* v. *Swadlin.* 1 *Atkins*, 294. But the ſame rule does not apply in every caſe of a perſonal diſcharge. For inſtance, if a creditor covenants never to ſue a debtor, this covenant may be pleaded by the debtor by way of diſcharge; but if two be bound jointly and ſeverally, and the creditor covenants with one of them not to ſue him, it has been held, that that ſhall not be a releaſe, but a covenant only; for the covenant is not a releaſe in its nature, but only by conſtruction, to avoid circuity of action; for where he covenants not to ſue one, he has ſtill a remedy, and then it ſhall be conſtrued as a covenant, and no more. *Fitzgerald* v. *Trant*, 11 *Mod.* 254. *Lacy* v. *Kinnaſton*, 1 Lord *Raymond*, 690. 12 *Mod.* 551; and in a late caſe where the creditor joined in a deed of compoſition with the other creditors of one of two obligors, by a joint and ſeveral bond, it was accordingly held that the other obligor could not avail himſelf of this as a releaſe. The laſt preceding caſe being cited, Lord *Kenyon* ſaid, that to be ſure it removed all difficulty on the ſubject, and was a direct authority in favour of the plaintiff; he had only been doubting in his own mind on the ſtrict law of the caſe, for that the honeſty and juſtice of it were with the plaintiff could not be doubted, and even if the defendant had ſucceeded at law, a court of equity would have given the plaintiff full relief. *Dean* v. *Newall*, 8 *T. R.* 168.

In another recent caſe, it appeared that *Paſhley* and *Dennis* were indebted as partners to *Popplewell.* That *Dennis* compounded with his creditors for 10*s.* in the pound, and *Popplewell* executed the agreement for the compoſition. Afterwards, a commiſſion of bankruptcy iſſued againſt *Paſhley*, under which *Popplewell* was admitted to prove his debt, and afterwards he received the compoſition, and a petition was preſented, that the debt might be expunged, in ſupport of which, the counſel cited the caſe of *Bower* v. *Swadlin*, 1 *Atk.* above referred to. On the other ſide, it was ſaid that without doubt a releaſe to one of two joint debtors is a releaſe to both, according to the caſe cited; but that is upon technical reaſons; and courts of equity have always lamented the neceſſity of following the law in that. It was impoſſible to ſuppoſe

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ſpecially, and *Rolls* argued, that the debt was not abſolutely diſcharged, but only *ſub modo*, viz. if the other can have the releaſe to plead, and becauſe the forbearance was a good conſideration. But the Court was of opinion, that the debt was abſolutely diſcharged, and therefore the conſideration was inſufficient. See *Hobart Rep.* 7. c. *Parker* v. Sir *John Lawrence.* In treſpaſs againſt three they divided on the pleading. Judgment againſt one. Then he entered a *noli proſequi* againſt the two others; it was held to be no diſcharge to him againſt whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not ſubject to the damages recovered againſt him; but a *noli proſequi*, or nonſuit, before judgment againſt one, would diſcharge all.

any intention to diſcharge this man upon receiving 10*s.* in the pound from the other. The Lord Chancellor made the order according to the prayer of the petition. *Ex parte Slater*, 6 *Veſ.* 146.

This deciſion appears to be directly contrary to that in the preceding caſe of *Dean* v. *Newall*, and it may be reaſonably ſuppoſed, that if the Lord Chancellor had been appriſed of a caſe ſo immediately applicable, and at the ſame time conſiſtent with the real principles of juſtice, and with the intention of the parties, he would have been very willing to have acceded to the authority of it. In the caſe cited of *Bower* v. *Swadlin*, the obſervation, which is only made *obiter*, that a releaſe to one is a releaſe to all in equity, as well as at law, may be fairly underſtood, *ſub modo*, viz. that if a perſon by his own act relinquiſhes a right ſo as to render himſelf incapable of proſecuting it at law, a court of equity will not interpoſe in his favour; but I do not find any decided authority, that a court of equity will carry ſuch an act beyond its legal operation. It is certainly reaſonable, that it ſhould interpoſe, to prevent ſuch an act operating to the prejudice of the joint debtor; but there is no equitable reaſon for carrying its authority further.

Whether the doctrine that a releaſe to one of two perſons, who enter into a joint and ſeveral obligation, enures to the benefit of all, extends to all kinds of contracts, does not ſeem to be fully ſettled; and in the caſe of *Clayton* v. *Kinnaſton*, 2 *Salk.* 574, Lord Chief Juſtice *Holt* ſaid, that the Court did not determine that on a covenant where the joint remedy failed, there could not be a ſeveral remedy.

There is a very old caſe, that if two receive for me a ſum of money jointly, and afterwards each of them binds himſelf to account for the whole, and afterwards I bring a writ of account againſt them, by divers *precipes*, and count ſeverally againſt them, as my receivers of the ſaid ſum, my releaſe made to one of them of all debts and accounts ſhall be a releaſe of the other alſo. 2 *E.* 3. 40 *b.* 2 *Rol. Ab.* 412. 18 *Viner*, 353.

There are very numerous authorities, that if ſeveral perſons commit a joint treſpaſs, a releaſe to one is a diſcharge to all the others. *Co. Lit.* 232. *Hob.* 66. 2 *Rol.* 412. 18 *Viner*, 352.

Where one of two joint or joint and ſeveral obligors only engages as ſurety for another, the giving time to the principal is in equity a diſcharge of the ſurety. *Nifbet* v. *Smith*. 2 *Brown, Ch.* 578. *Rees* v. *Berrington*, 2 *Veſ. jun.* 540. (*a*)

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(*a*) In this caſe, Lord *Loughborough* ſaid, that the creditor, by taking notes and giving further time to the principal, does a material injury to the ſurety, who has a right, the day after

As the acceptor of a bill of exchange is the perſon primarily liable, any compoſition with him diſcharges the indorſers; and if he has effects of the drawer, it diſcharges the drawer likewiſe. But the holder of a bill, accepted by a perſon having no effects, does not relinquiſh his right againſt the drawer, by taking ſecurity from the acceptor, and giving him time. *Ex parte Smith*, 5. *Bro. Cha.* 1. *Ex parte Holden*, *Cooke's Bankrupt Law.*

And it has ſince been held, that the holder of a bill who took the acceptor of a bill of exchange in execution, and afterwards diſcharged him from cuſtody, upon payment of part of the amount, and giving ſecurity for the remainder, with a ſmall exception, thereby exonerated the preceding parties. *Engliſh* v. *Darley*, 2 *Baſ.* 61.

The report of a former caſe of *Hayling* v. *Mayhall*, 2 *Bl.* 1235, which appears by the marginal abſtract of it contrary to this deciſion, was truly obſerved by Lord *Eldon*, upon examination of the contents of it, not to be ſo. The corollary neceſſarily reſulting from theſe caſes, is, that a forbearance given to the perſon who as between the parties themſelves is chargeable with the debt as principal, and whom the creditor is bound to recognize as ſuch, is a

after the bond is due, to come into equity [p], and inſiſt upon its being put in ſuit; the creditor has ſuſpended that till the time contained in the notes runs out; therefore, he has diſabled himſelf to do that equity to the ſurety which he has a right to demand. If the application was proved, it is a duty to comply with it. The creditor has put it out of his power to perform that which the nature of the relation between the ſurety and the perſon with whom he is bound requires. It is a breach of the obligation, in conſcience and honeſty, and it is not too much to ſay of that obligation, in point of law. The Court cannot try the cauſe by enquiring what miſchief it might have done, for that would go into a vaſt variety of ſpeculation, upon which no ſound principle could be built. This produces no inconvenience to any one; for it only amounts to this, that there ſhall be no tranſaction with the principal debtor, without acquainting the perſon who has a great intereſt in it. The ſurety only engages to make good the deficiency. It is the cleareſt and moſt evident equity not to carry on any tranſaction, without the privity of him who muſt neceſſarily have a concern in every tranſaction with the principal debtor. You cannot keep him bound and tranſact his affairs (for they are as much his as your own), without conſulting him. You muſt let him judge, whether he will give that indulgence contrary to the nature of his engagement.

See alſo the caſe of *Law* v. *Eaſt India Company*, 4 *Veſ.* 824. which was in a great meaſure decided upon its particular circumſtances, but from which it may be proper to extract the following obſervations of the Maſter of the Rolls: "It cannot be concluded upon any principle that prevails with regard to principal and ſurety, that where the principal has left a ſufficient fund in the hands of the creditor, and he thinks fit, inſtead of retaining it in his hands, to pay it back to the principal, the ſurety can ever be called upon."——"There is no doubt that upon a joint and ſeveral bond each obligor is a principal at law; but a Court of equity makes a wide difference between principals and ſureties."——"Where any act has been done by the obligee that may injure the ſurety, the Court is very glad to lay hold of it in favour of the ſurety."

[p] But query whether this can be done without an immediate offer of paying what is due? See *Gammon* v. *Stone*, *poſt. p.* 76.

diſcharge of the others, who are only to be regarded as his ſureties; but that a diſcharge to a perſon, who is in effect only liable as a ſurety, does not affect the claim againſt the party, who having alone received the benefit of the contract, is as between the ſeveral debtors finally chargeable as the principal.

In the caſe of *Stock* v. *Mawſon*, 1 *Bof.* 286, it appeared that the plaintiff being indebted to the defendant, gave him a bill of exchange, which was accepted but not paid when due; the defendant afterwards agreed with the other creditors of the plaintiff, in accepting a compoſition of eight ſhillings in the pound, and afterwards received the amount of the bill from the acceptor, conſidering himſelf as a truſtee for the plaintiff for all that he ſo received above twelve ſhillings in the pound: and it was held that he was liable to pay to the plaintiff the whole money which he had received from the acceptor. The principle upon which the Court ſeems to have proceeded, was, that the effects of the plaintiff, in the hands of the acceptor, were to be conſidered as a part of the plaintiff's property. I have, however, ſeldom met with a caſe which I have conſidered as more difficult to reconcile with the principles of juſtice. After a debtor has accepted a bill, it is a fallacy to ſuppoſe that the effects in his hands are to be conſidered as the effects of the drawer, for the engagement which is made by the acceptance is, as between the acceptor and the drawer, tantamount to a payment, and the only remaining obligation is to ſatisfy the bill, the former obligation no longer ſubſiſting. The ſame effect ariſes between the drawer of the bill and the perſon to whom it is given; ſuch bill, until diſhonoured, is a payment of the debt; the direct obligation which then ſubſiſts is that of the acceptor to pay the bill, the drawer being only ſubject to an acceſſory obligation (in the nature of a ſurety), in caſe the acceptor fails in the performance of the principal obligation, and due diligence is exerciſed by the holder; but when, from the non-performance of the principal obligation, the liability of the ſurety attaches, there is ſurely no injuſtice in releaſing the ſurety, upon the acceptance of a partial ſatisfaction, without relinquiſhing the right of claiming a ſatisfaction from the principal, provided the ſurety is not thereby prejudiced in his claim againſt the principal; if the ſurety (the drawer) paid the whole, he might recover the whole from the principal (the acceptor), and he has in the like manner a proportionate right upon the payment of a part; and in caſe the creditor receives the whole from the principal, he is accountable to the ſurety for what he has before received from him. If a creditor receives a pledge for his debt, there is no inconſiſtency in his diſcharging the perſonal reſponſibility without relinquiſhing the benefit of the pledge; and if ſuch diſcharge is accompanied with a partial ſatisfaction,

tion, the pledge continues available for the reſidue. It can hardly be ſuppoſed to be the actual intention of the creditor, in liberating the ſurety, to liberate alſo the principal debtor, or in diſcharging the perſonal reſponſibility, to abandon the pledge which is given for the aſſurance of the ſame duty; for the principle of the Roman law, that *nemo præſumitur donare*, is not a narrow rule of poſitive inſtitution, but a natural inference of reaſon and juſtice, any intention in oppoſition to that principle ought therefore to be diſtinctly and unequivocally expreſſed, and the implication of ſuch intention can only ariſe from the ſubtilties of technical reaſoning (*a*). The caſe afterwards came before the Court of Chancery, *6 Veſ.* 300, where the deciſion turned upon principles not immediately applicable to the preſent diſcuſſion; both courts ſeemed to have entertained the ſuppoſition, that if bills were accepted without effects, it would be unreaſonable that the drawer, after having compounded with the holder, ſhould be liable to the acceptor, and taking that for granted, they infer that there is no difference, if there are effects, for that then the diſcharging the acceptor from the debt to the drawer, would amount to the ſame thing, and be a prejudice to him, but I conceive that the holder of a bill is at all times, or at leaſt generally, and unleſs affected by notice, or other ſpecial circumſtances, well founded in regarding the acceptor as having that character which appears upon the face of the inſtrument, as the principal debtor, and that although in ſome caſes the drawer may be reſorted to as ſuch principal, this deviation from the general rule is always for the benefit, and ought never to operate to the prejudice of the holder.

In a ſubſequent caſe, (*ex parte Gifford*, *6 Veſ.* 805.) *Marſhall* and *Haigh* being creditors of *Bedford*—*Bedford*, *Niblock* and *Burgeſs*, and *Baylis*, joined in a promiſſory note as a collateral ſecurity; *Baylis* entered into a compoſition with his creditors of 4*s.* in the pound, in which *Marſhall* and *Haigh* concurred, and gave him a receipt in full; *Bedford* and *Niblock* and *Burgeſs* became bankrupts; *Bedford* paid 4*s.* in the pound; *Niblock* and *Burgeſs*, 5*s.*; and the petition was preſented on the part of the aſſignees of *Niblock* and *Burgeſs*, praying that the proof upon their eſtate might be expunged; and in ſupport of the petition, it was contended, that this diſcharge of *Baylis* was a diſcharge of the

(*a*) Viewing the caſe as totally unconnected with all profeſſional reaſoning, is it poſſible to imagine, as a matter of fact, that a perſon agreeing to liberate the drawer of a bill of exchange upon payment of 8*s.* in the pound, actually intends at the ſame time, and as a neceſſary conſequence of ſuch agreement, to make him a preſent of the remaining 12*s.* which may be eventually received from the acceptor, the principal debtor?—And if it is impoſſible to ſuppoſe ſuch an intention to have actually exiſted, why is it to be preſumed, from the mere act of liberating the drawer, that any ſuch intention was profeſſed, and that the following up a legal right was a deceit and violation of good faith?

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co-ſureties *Niblock* and *Burgeſs*, in the ſame manner as the diſcharge of the principal is the diſcharge of the ſurety; for the ſurety who had received the diſcharge would be thereby freed from contributing towards what might be afterwards paid by the co-ſurety. The deciſion of the Lord Chancellor was, that the petition was at leaſt premature, for that until *Niblock* and *Burgeſs* had paid 10*s.* in the pound, for which they were liable, as between themſelves and *Baylis*, they could have no cauſe of complaint. His lordſhip entered in ſome degree into the general queſtion of the ſurety being diſcharged by the diſcharge of the principal, as proceeding upon the ground that otherwiſe the principal, who would be liable over to the ſurety, would not have the benefit of his diſcharge, and referred to the opinion of Lord *Thurlow*, that the ſurety would not be diſcharged, if there was an expreſs reſervation at the time of the compoſition, for that then the ſubſequent demand was aſſented to, in the terms of the contract. But this ground does not fully meet the law upon the ſubject; for it is held, as we have ſeen, that the ſurety is abſolutely liberated, not only when the principal is entirely diſcharged, but alſo when time is granted to him. Now the principal would not loſe the benefit of the contract with himſelf, unleſs the ſurety were proceeded againſt within the time allowed to the principal; therefore, the diſcharge of the ſurety is referable to a more extenſive principle than that of the mere effect of a circuitous liability, defeating the benefit acquired to the principal. It ſeems impoſſible that the laſt caſe can be reconciled with that of *Stock* v. *Mawſon*, when reduced to their fundamental principles. If a diſcharge to one of two perſons, who, as between themſelves, are jointly and equally liable, is not an exoneration of the other, except ſo far as it actually operates to his prejudice; much leſs can a diſcharge to the ſurety (the drawer) operate as a diſcharge to the principal (the acceptor); and if the acceptor, in the caſe of *Stock* and *Mawſon*, was liable to the plaintiff (the drawer) for the effects in his hands, in conſequence of the tranſaction between the plaintiff and defendant, he could not alſo be liable to the defendant (the holder); and if the acceptor was not liable to the holder, the diſcharge of the ſurety induced the diſcharge of the principal; but how very far was it going beyond that, when it was held, that the receipt of part from the ſurety was a transfer to him of the whole that was due upon the obligation of the principal: and that what was only intended to liberate him from an obligation, ſhould give him a claim to property, to which he was not otherwiſe intitled.

It alſo appears to me very difficult to reconcile, in principle, the opinion in the caſe *ex parte Gifford* with that in *ex parte Slater* before cited; and if they are irreconcilable, there can be no queſtion as to which the real principles of juſtice would award the preference.

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The principles which prevail in reſpect to the drawer and indorſers, upon a forbearance to the acceptor, are equally applicable to a forbearance given to a drawer or indorſer, which operates as a full diſcharge to the ſubſequent indorſers, in reſpect to whom the other party is to be regarded as a principal debtor.

In the caſe *ex parte Smith*, 1 *P. W.* 237, it appeared that *A* lent money to *B* and *C*, on their bond, that *B* became a bankrupt, and *A* took *C* in execution, and *C* thereupon paid *A* 24*l.* and *A* conſented to diſcharge *C* out of execution. Upon which it was objected that this being an eſcape with the conſent of the plaintiff, the obligee, and the debt being in law entire, it was a diſcharge of the whole debt, and ſhould operate as well for the benefit of B the bankrupt, the other obligor, as of *C*. But it was anſwered, that the bankruptcy of *B*, and the aſſignment of his eſtate, were prior to the execution taken out againſt *C*, and by that aſſignment *A*, the plaintiff, had an intereſt in the eſtate of *B* the bankrupt, which intereſt could not be diſcharged by *A*'s taking out an execution afterwards againſt *C*, the other obligor, any more than if two were bound in a bond to me, and I ſhould recover judgment, and take out an execution againſt the goods of one, and afterwards on obtaining a judgment, ſue out an execution againſt the body of the other, and then conſent that the latter ſhall eſcape, this will not diſcharge the execution againſt the goods, which was before completed againſt the former obligor; and that this was ſtill harder doctrine in equity. And the Lord Chancellor admitted him to prove a moiety of the debt. The reporter ſubjoins a query, why he was not admitted for the whole.

There are no caſes, ſo far as I am aware, which furniſh any thing analagous to the doctrine ſtated by *Pothier*, concerning a releaſe of ſolidity, though ſometimes ſuch a releaſe may be very important and deſirable; as for inſtance, when one entire rent is charged upon ſeveral houſes, the perſon to whom it is due may diſtrain upon any of them for the whole, although as between themſelves each may be only liable for an inconſiderable portion, which liability materially diminiſhes the reſpective and conſequently the aggregate value; and therefore the releaſe of ſuch an entire liability, and an agreement to accept the particular proportion, is an object of great value to the ſeveral proprietors.

With reſpect to a mere perſonal obligation, if a creditor releaſes one of ſeveral joint and ſeveral debtors of any part of his liability, it ſhould ſeem a neceſſary conſequence of what has been premiſed, in reſpect to a releaſe for the whole, that this releaſe would be equally available to any of the others.

But the *Engliſh* law would not adopt the implications of a partial diſcharge, under the circumſtances ſtated by *Pothier*, and as a gene-

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ral principle, the obligation once contracted can only be defeated by an actual performance, or an expreſs releaſe.

With regard to the effect of an action being inſtituted againſt one for his own individual ſhare, and a ſubſequent liability in reſpect to the ſhares of the others, I conceive that a diſcuſſion would be in general precluded, by the principle of the *Engliſh* law, which will not admit of ſeveral actions being brought againſt the ſame perſon, upon one and the ſame obligation.

The ſubrogation or ceſſion of actions, is alſo a ſyſtem to which the deciſions of our own courts have but a very limited analogy. The following are the principal caſes founded upon a ſimilar principle. In the caſe *ex parte Scrip*, 1 *Atkins*, 133, it was ſaid by Lord *Hardwicke*, that where there is a principal and ſurety, and the ſurety pays off the debt, he is entitled to have an aſſignment of the ſecurity, in order to enable him to obtain ſatisfaction for what he has paid over and above his own ſhare; and in the principal caſe, upon ſuperſeding the commiſſion againſt one of three partners, upon his paying the debts proved, his lordſhip directed that the ſeveral creditors who had proved their debts, ſhould aſſign the ſeveral ſecurities, given to them by any of the partners, to a truſtee in truſt, to ſecure to the petitioner, and any other of the partners, ſo much money as they ſhould reſpectively pay, more than their reſpective juſt portions. In *Bower* v. *Swadlin*, 1 *Atkins*, 294. the obligee of a bond gave a releaſe to one of the obligors, and a bill was brought by the repreſentatives of the obligee, and likewiſe by a truſtee under the aſſignment of the bond for payment, and the defendant inſiſted by way of plea, that a releaſe to one co-obligor was a releaſe to all, the Lord Chancellor ſaid there was no doubt, but that a releaſe to one, was a releaſe to both in equity, as well as at law, but if there was an aſſignment of the bond in truſt for the benefit of the others precedent to the releaſe, though the aſſignment be with or without conſideration, it would be a material queſtion whether the obligee could releaſe, or if it could operate to the benefit of the releaſe; and his Lordſhip directed the cauſe to ſtand over, until it appeared whether the releaſe was precedent or ſubſequent to the aſſignment. In *Gammon* v. *Stone*, 1 *Veſ.* 339, the executors of a ſurety filed a bill, ſtating a offer of payment; and that the only terms which they inſiſted on were, that the creditor ſhould aſſign over the bond to them, with a letter of attorney empowering them to uſe his name upon their giving him an indemnity which he refuſed, and praying that he might receive his money, and that they might have the bond aſſigned and liberty to make uſe of it; the Lord Chancellor was of opinion that the plaintiffs had no right to expect the aſſignment, and that it was not to be inſiſted

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upon, becauſe it was quite uſeleſs. In *Waſſingham* v. *Sparks*, 2 *Veſ.* 569, a ſurety filed a bill againſt the principal and the obligee, that the obligee might either put the bond in ſuit againſt the principal, or aſſign over the bond to the plaintiff that the plaintiff might do it and it was ſaid by the Maſter of the Rolls that the aſſignment would be of no uſe to the plaintiff; for if the co-obligor in the bond was paid off, the principal might take advantage of that, and plead payment in bar of an action inſtituted by the plaintiff, in the name of the obligee, as it muſt be. (*a*)

It was formerly doubted whether one of two joint contractors, who had paid the whole of the debt could maintain an action againſt the other, as for money paid to his uſe; or whether the ſurety could maintain ſuch an action againſt his principal for the whole, or againſt another ſurety for his proportion; but the right of ſuch actions is now perfectly ſettled, and they are familiar in practice.

A ſuit in equity might always have been ſuſtained for this purpoſe.

In a late caſe in the Common Pleas, Lord *Eldon* intimated a doubt whether a diſtinction might not be made, between holding that an action at law is maintainable in the ſimple caſe where there are but two ſureties, or where the inſolvency of all the ſureties but two is admitted, and the inſolvency of the principal is admitted, and holding it to be maintainable in a complicated caſe, where ſuch an inſolvency was neither admitted nor proved, and where the defendant, after a verdict againſt him at law, may ſtill remain liable to various ſuits in equity with each of his co-ſureties, and where the event of the action cannot deliver him from being liable to a multiplicity of other ſuits, founded upon his character as a co-ſurety. *Cowell* v. *Edwards*, 2 *Boſ.* 268.

The general doctrine of contribution was moſt ably conſidered by Lord Chief Baron *Eyre*, in the caſe of *Deering* v. Lord *Winchelſea*, and others, on the equity ſide of the Exchequer, 2 *Boſ.* 270. Sir *Edward Deering*, Lord *Winchelſea*, and Sir *John Rous*, became bound in three ſeveral bonds, that *Thomas Deering* ſhould duly account as receiver of the cuſtoms. A ſum rather leſs than the penalty of the reſpective bonds was levied upon Sir *Edward Deering*, who filed a bill againſt the other two for contribution, which, his lordſhip obſerved, was reſiſted on the ground that there was no foundation for the demand, in the nature of the contract between the parties; the counſel for the defendants, conſidering the title to contribution, as ariſing from contract expreſſed or implied, that

(*a*) But ſee *Rees* v. *Berrington*, *ſupra*. *Wright* v. *Simpſon*, 6 *Veſ.* 734. *Beardmore* v. *Cottenden*, *Ca. B. L.* 211.

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it was admitted that if they had all joined in one bond, for the aggregate amount of the ſeparate penalties in each, there muſt have been contribution, but that this was ſaid to be on the foundation of contract, implied from their being parties in the ſame engagement, and here the parties might be ſtrangers to each other, and that it was ſtated that no man could be called upon to contribute, who was not a ſurety on the face of the bond to which he was called to contribute. His Lordſhip ſaid, that the point remained to be proved, that contribution was founded upon contract. That if a view was taken of the caſes, it would appear that the bottom of contribution was a fixed principle of juſtice, and was not founded in contract; that contract indeed might qualify it, as in *Swain* v. *Hall*, 1 *Ch. Rep.* 149. where three were bound for *H.* in an obligation, and agreed, if *H.* failed, to bear their reſpective parts. Two proved inſolvent, the third paid the money, and one of the others becoming ſolvent, he was compelled to pay a third only (*a*). His lordſhip having cited ſeveral caſes and authorities, in reſpect of the obligation of ſeveral parties liable to an entire duty, to contribute their reſpective proportions, and amongſt the reſt Sir *William Harbet*'s caſe, 3 *Co.* 11. *b.* where many caſes are put of contribution at common law, and the reaſon is, they are all *in quali jure*, and as the law requires equality, they ſhall equally bear the burthen. This is conſidered as founded in equity; contract is not mentioned. He proceeded as follows:

"In the particular caſe of ſureties, it is admitted that one ſurety may compel another to contribute to the debt for which they are jointly bound. On what principle; Can it be becauſe they are jointly bound? What if they are jointly and ſeverally bound? What if ſeverally bound by the ſame or different inſtruments? In every one of thoſe caſes, ſureties have a common intereſt, and a common burthen. They are bound as effectually, *quoad* contribution, as if bound in one inſtrument, with this difference only, that the ſums in each inſtrument aſcertain the proportions, whereas if they were all joined in the ſame engagement, they muſt all contribute equally.

"In this caſe Sir *E. Deering*, Lord *Winchelſea*, and Sir *John Rous* were all bound, that *Thomas Deering* ſhould account. At law all the bonds are forfeited. The balance due might have been ſo large as to take in all the bonds, but here the balance happens to be leſs than the penalty of one, which ought to pay? He on whom the crown calls, muſt pay to the crown; but as between themſelves they are *in æquali jure*, and ſhall contribute. This principle

(*a*) *Vide Petre* v. *Rich*, 1 *Ch. Rep.* 35, cited in a note to *Deering* v. Lord *Winchelſea*, where two out of three ſureties were compelled to pay in moieties, the third being inſolvent.

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is carried a great way, in the caſe of three or more ſureties in a joint obligation; one being inſolvent, the third is obliged to contribute a full moiety. This circumſtance, and the poſſibility of being made liable to the whole, has probably produced ſeveral bonds. But this does not touch the principle of contribution, where all are bound as ſureties for the ſame perſon.

"There is an inſtance in the civil law of average, where part of a cargo is thrown overboard to ſave the veſſel. *Show Parl. Caſ.* 19 *Moor*, 297. The maxim applied is *qui ſentit commodum ſentire debet et onus.* In the caſe of average there is no contract expreſs or implied, nor any privity in an ordinary ſenſe. This ſhews that contribution is founded on equality, and eſtabliſhed by the law of all nations.

"There is no difficulty in aſcertaining the proportions in which the parties ought to contribute; the penalties of the bonds aſcertain the proportions."

In *Cowell* v. *Edwards*, 2 *Boſ.* 268, already cited, one of ſix ſureties having paid more than his proportion of the debt, brought an action againſt another for ſo much, as, when added to what he had already paid, would make up one third of the whole, three of the other ſureties being inſolvent. The Court obſerved that it might perhaps now be found too late, to hold that this action could not be maintained at law, though neither the inſolvency of the principals, or of any of the co-ſureties were proved; but that at all events the plaintiff could not be entitled to recover at law, more than one-ſixth of the whole ſum paid.

If a ſurety, after the bankruptcy of his principal, pays the debt, or if one of the two partners after the bankruptcy of the other pays the whole, he may bring an action to recover the amount of proportion, notwithſtanding the bankrupt is diſcharged by his certificate. *Wright* v. *Hunter*, 1 *Eaſt*, 20.

But if a ſurety at the time of his becoming ſuch, takes an expreſs ſecurity, it is held that the promiſe implied by operation of law does not attach. *Touſſaint* v. *Martinnant*, 2 *T. R.* 100.

The laſt point diſcuſſed by *Pothier*, *viz.* whether when ſeveral perſons are condemned in ſolido, to pay another a ſum of money on account of an action ariſing *ex delicto*, he who pays the whole can have an action againſt the others, received a determination, though in a very ſummary manner, in the caſe of *Merryweather* v. *Nixon*, 8 *T. R.* 186, in which a ſum of money having been recovered againſt two defendants, in an action for an injury done to a mill, in which action was included a count in trover for the machinery, one of the defendants, againſt whom the whole had been levied,

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brought an action againſt the other for a contribution of a moiety, as for ſo much money paid to his uſe. Mr. Baron *Thomſon*, before whom the cauſe was tried, being of opinion that no contribution could by law be claimed as between joint wrong-doers, and conſequently that this action upon an implied aſſumpſit, could not be maintained on the mere ground that the plaintiff had alone paid the money, which had been recovered againſt him and the other defendant in that action, and a non-ſuit having been entered upon this opinion, Lord *Kenyon* upon an application to ſet it aſide ſaid, there could be no doubt but that the non-ſuit was proper; that he had never before heard of ſuch an action having been brought, where the former recovery was for a tort. That the diſtinction was clear between this caſe, and that of a joint judgment againſt ſeveral defendants, in an action of aſſumpſit, and that this deciſion would not affect caſes of indemnity, where one man employed another to do acts, not unlawful in themſelves, for the purpoſe of aſſerting a right; and the Court refuſed a rule to ſhew cauſe.

The caſe of *Philips* v. *Biggs*, *Hardr.* 164, was mentioned by *Law* for the defendant, as the only caſe to be found in the books in which the point had been raiſed; but it did not appear what was ultimately done upon it.

This caſe, ſo peremptorily decided as not to be allowed even the honour of a deliberate conſideration, may perhaps be held to have ſettled the law upon the ſubject, but it muſt be a matter of regret to ſee an adjudication ſo poſitively made, which is ſo manifeſtly contrary to what every man muſt feel to be the real principles of juſtice, eſpecially when it was not called for by any imperious authority of law. Nothing can be more obvious than the preference due to the *French* law (adopting the principle of equity, which does not allow one of the co-debtors to enjoy at the expence of another, the liberation from a debt for which they are equally liable), over the ſcrupulous principles of the *Roman* juriſts, which did not give the debtor who had paid the whole to have any recourſe againſt the others. Though the original foundation of the demand is an injury, by which no man can acquire to himſelf a right, the obligation ariſing from the judgment into which the cauſe of action for the injury is converted, has, in every other reſpect, the character and properties of a debt, and the obligation of contribution is founded upon the general principles, ſo accurately ſtated by the Lord Chief Baron *Eyre*, in the caſe of *Deering* v. Lord *Winchelſea*, by which all who are equally liable to a common demand, ought equally to ſuſtain the burthen of diſcharging it.

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NUMBER XII.

(Referred to, Vol. I. p. 204.)

On Penal Obligations.

The Chapter of *Pothier* on penal obligations, appears to be wholly referable to cases in which there is a distinct and absolute agreement, independent of the penalty; and upon failure of which the penalty as being merely accessary, becomes necessarily void; the existence of some other agreement, whether valid or otherwise, being constantly assumed.

The case of a bond in a given sum of money, with a condition to vacate the same upon a certain event, (which in *England* is a common instrument,) may in some respects fall under a different consideration; for a failure in the subject of the condition does not necessarily induce an insufficiency in the obligation.

We have seen in the Notes to the Chapter on Conditions, that an impossibility in the condition does not defeat the obligation; but in point of law, the engagement is absolute as if no condition had been added; on the other hand, if there is any thing illegal in the object of the contract, the obligation and condition are equally void. Where the condition refers to, and is intended to enforce another agreement, I conceive that the consequences stated by *Pothier*, will in general apply in this country: where a bond was for the performance of the covenants in a deed, and these related to a term of years which was held to be void in law, it was urged that the condition was single; for if the condition refers to a thing which does not exist, it is the same as if there was no condition; to which the court inclined; but afterwards it was held, that as the covenant and obligation were both for the corroboration of a grant which was void, they were void also. 1. *Lev.* 45. In a case which occurred a short time before, the condition of a bond was to perform the covenants in an indenture, and the defendant having pleaded that there were no covenants in the indenture, the plaintiff had judgment; because if there were no covenants in the indenture the obligation was single. 1 *Lev.* 3. These cases of an obligation being held single, do not occur in modern practice; and a court of equity would probably relieve against the effects of them, except so far as they were intended to inforce a real contract, and were fully intended to constitute an actual debt.

A bond with a penalty may in equity be considered as the evidence of an agreement, and the execution of it enforced according-

ly; and therefore in cases where bonds have been given in contemplation of marriage, by the intended husband or wife, to the other, which bonds were considered as having become void at law by the marriage, they were regarded as agreements for performance of the acts specified in the condition, and enforced accordingly. See *Acton* v. *Pierce*, 2. *Vern.* 280. *Carmel* v. *Buckle*, 2. *P. Wms.* 243. *Watkins* v. *Watkins*, 2. *Atk.* 97. Where two persons borrowed money and gave a joint bond, it was enforced by Lord *Hardwicke* against the heir of the obligor, who died first, as if it had been joint and several: his lordship saying, in reference to preceding cases, that the reason the court had gone upon was that the bond was to be considered as an agreement in writing; and therefore though the obligation and penalty were gone by the legal demand being gone, yet the condition, taking it altogether, was considered as an agreement in that court to pay the money, and an agreement under hand and seal. *Bishop* v. *Church*, 2 *Ves.* 371. And where the condition of a bond was in consideration of a sum of money, to convey and assure certain lands, the Master of the Rolls declared, that bonds of this nature were always considered in equity as articles of agreement, and decreed to be specifically performed. *Ann Mosely*, 39. So Lord *Parker* said, in *Parks* v. *Wilson*, 10. *Mod.* 518, that bonds are considered as evidences of agreements, and the obligors held to a specific performance, and not allowed to forfeit the penalty. In *Hodson* v. *Trevor*, 2 *Peer Wms.* 191. the defendant, on the marriage of his daughter, gave a bond in the penalty of 5000*l.* to the plaintiff, the intended husband, with condition reciting an agreement, that he should within three months after the death of his (the defendant's) father, settle one third part of the estate that should descend to him, upon the plaintiff for life, with remainder to the daughter for life, and remainder to the issue of the marriage, and declaring that the bond should be void on making such settlement. A large estate having afterwards descended, the plaintiff filed a bill requiring a settlement of a third part, to which it was objected that he should have no more than the penalty of 5000*l*; but the Lord Chancellor said, that it could be no argument to say, that the defendant ought only to pay the penalty of 5000*l.* because the agreement was recited in the bond, and such agreement was not to be the weaker, but the stronger for the penalty; and by the same reason, that had the penalty been higher, and beyond the value of the third part of the real estate, in such case the defendant would not have been bound to pay it; so now the penalty being beneath the value of a third part of the estate, the defendant is not bound to accept it; besides it was to be a settlement

for

for the benefit of the iſſue of the marriage, and the payment of the 5000*l.* to the huſband would not anſwer the purpoſe.

And in another caſe, where, after a parol agreement by the huſband's father to ſettle lands, he gave a bond in the penalty of 1200*l.* conditioned to pay 600*l.* if he did not do ſo; Lord *Hardwicke* ſaid, that the general queſtion whether the party had an election or option to ſettle the lands agreed in the bonds to be ſettled, or to pay the penalty of 600*l.* would depend on the conſideration what was primarily and originally the intent of the agreement; whether it was that the lands ſhould be ſettled, and this 600*l.* was only to be conſidered as a penalty, or further ſecurity for it; or whether it was agreed and ſtipulated, that either the one or the other was to be the proviſion for the huſband, and iſſue of the marriage? His Lordſhip ſaid, he muſt conſider the agreement to ſettle the lands as the primary and original agreement; and that the other was only by way of further ſecurity or penalty, (call it what you pleaſe,) and an enforcing the making of the ſettlement. Suppoſe the agreement which is contained in the condition of the bond (which is a common but inaccurate way of making marriage agreements) had been in articles, inſtead of the condition of a bond, and an expreſs direction (*a*) in the ſame words as here, that the huſband, and his father, covenanted to ſettle theſe lands in ſuch a time, or in default thereof, that they ſhould pay 600*l.* the conſtruction the court would have made, would not be that this gave the huſband or his father an option to ſettle the lands or pay 600*l.* but they would ſay without heſitation that this was an agreement to ſettle the lands, and that the 600*l.* was a penalty if they did not ſettle within a certain time, and nothing elſe; if this would be ſo, then there would be no ground to make a different conſtruction, when this is contained in the condition of a bond. But on the part of the defendant, a circumſtance is made uſe of, and very properly, from that form of working it up, that if this was a penalty, what occaſion was there for making a further penalty of 1200*l.*? but on conſidering the whole, he thought that was barely an inaccuracy in the forming of the agreement, and that no ſuch intent or conſtruction would be drawn from it, as was drawn for the defendant. They had made an agreement before marriage to ſettle the lands, (as he muſt take it, for it was ſo recited,) and if no ſettlement, that penalty; they reduce this into a bond; what ground is there to ſhew they intended this for a ſatisfaction? If indeed it could be ſhewn that no good title could be made, and that the defect of performance aroſe from inability, that they might have in view, but

(*a*) Qu. declaration.

not if the husband or his father had it in their power to make a settlement. *Challoner* v. *Challoner*, 2 *Vef.* 528.

In *Collins* v. *Collins*, 2 *Bur.* 820. Lord *Mansfield* observed, that the constant course of courts of equity was to consider the conditions of the bond, as the agreement of the party; and in *Mackworth* v. *Thomas*, 5 *Vef.* 329, Lord *Loughborough* said, that there was no doubt of that proposition; but in the same case, where the arrears of an annuity exceeded the penalty of the bond given for its security, he held that the bond could not, in the administration of legal assets, be allowed *to rank as a specialty* beyond the amount of the penalty; which distinction was certainly just, and accordant with the correct principles of equity. The Court will not cramp a security, so as to defeat or curtail the operation of the substantial agreement of the parties; and in furtherance of the agreement will relieve them against the legal strictness, resulting from the formality of the agreement, but will not extend the mere legal advantage arising from such technical formality beyond its own limits, to the prejudice of other interests equally entitled to protection, as being equally founded upon the general intention of the contracting parties; which general intention is the only principle upon which a court of equity can carry the substantial effect of a legal instrument beyond its legal operation.

The author of the *Treatise of Equity*, speaking upon this subject, observes, that though formerly courts of equity thought that where a bond was given to perform any agreement, the obligor had his election either to do the thing, or pay the money; and that the obligee having chosen his security, ought to be left to it; yet now they consider the penalty only as a collateral guard to the agreement, which still remains the same, and unimpeached by the parties, providing a further remedy at law for the performance, and, therefore, proper to be executed in that court; for it would be hard, that enlarging a person's security at law should make him in a worse condition in equity than if he had taken none at all; nor can it ever be intended, that a bond added only to enforce the performance, should weaken the lien of the agreement. And his learned annotator, Mr. *Fonblanque*, subjoins, that as courts of equity will interpose to restrain the recovery of the penalty, the principles of equal justice require that they should enforce the specific performance of the act agreed to be done, or restrain from doing that which was agreed not to be done. And upon this principle, wherever the primary object of the agreements be the securing the specific subject of the covenant, the party covenanting is not entitled to elect whether he will perform his covenant, or pay the money. Upon the concluding observations of the author, he remarks, that it may be laid down as

a general rule, that the agreement of the parties, if expreſs, ought not to be affected by the taking a collateral ſecurity, intended merely to ſecure the performance of ſuch agreement; but if the agreement be merely implied, as that the vendor ſhall have a lien upon the eſtate, until his purchaſe money be paid, the taking of a bond, or other ſecurity, for the purohaſe money, might reaſonably lead to the concluſion, that the vendor truſted to ſuch ſecurity, and that the property of the eſtate was intended to be abſolutely veſted in the vendee. *B.* 1. *c.* 3. § 2. This line of diſtinction is confirmed (independently of the authorities cited by Mr. *Fonblanque*) by the caſe of *Touiſſant* v. *Martinant*, 2 *T. R.* 100. A ſurety took a bond from his principal to pay the money, for which he was engaged, and the principal having become bankrupt, and obtained his certificate, the ſurety was not allowed to maintain the common action for money paid to the uſe of the principal, upon a payment ſubſequent to the bankruptcy. Mr. Juſtice *Buller* ſaid, that the law raiſed a promiſe againſt the principal, becauſe there was no ſecurity given by the party; but if the party chooſe to take a ſecurity, there is no occaſion for the law to raiſe a promiſe. Promiſes in law only exiſt where there is no expreſs ſtipulation between the parties. In the preſent caſe, the plaintiffs have taken a ſecurity, therefore, they muſt reſort to that ſecurity.

The effect of penal obligations is, according to the juriſprudence of this country, circumſcribed within much narrower limits than their literal import. With reſpect to the interpoſition of courts of equity, Lord *Thurlow* ſtated, in the caſe of *Sloman* v. *Walter*, 1 *Bro.* 418. that the rule that where a penalty is inſerted merely to ſecure the enjoyment of a collateral object, the enjoyment of the object is conſidered as the principal intent of the deed, and the penalty only as acceſſional, and therefore, only to ſecure the damage really incurred, was too ſtrongly eſtabliſhed in equity to be ſhaken. In the particular caſe, it was agreed that a partnerſhip ſhould be conducted entirely by one of the partners; but that the other ſhould have the enjoyment of a particular room, whenever he thought proper; and a bond being given to enforce the agreement, his lordſhip ſeems to have been of opinion, that the caſe was within the rule, as he continued the injunction to the hearing. The following are ſome of the caſes which had previouſly been decided upon this ſubject: *Sale* gave a bond to *Ryland* in 20*l.* not to diſparage his trade, and afterwards ſeeing a cuſtomer of *Ryland*'s cheapening a parcel of flounders, he ſaid to him, Why would you buy of *Ryland?* thoſe fiſh ſtink. *Ryland* put the bond in ſuit, and had a verdict. And it was held, that equity would not relieve, becauſe of the ſmallneſs of the ſum; but the Lord Keeper ſaid, it would be otherwiſe,

were the penalty greater, as 100*l.* or upwards. 1 *Cham.* 183. 1 *Eq. Ab.* 91.

On the sale of an estate, it was agreed that the purchaser should retain 400*l.* for two years, without interest; and if the wife of the seller in that time released her dower, he was to pay the 400*l.* or else retain it absolutely. The seller having died, his widow did not release her dower, but brought a writ of dower, and died before the recovery of it. A bill was filed for the 400*l.* because it was but in the nature of the penalty to secure against the dower, which was then at an end, and the purchaser was secured as well as if she had released within the two years, or after the two years had expired; in which case, as it was said, the court would certainly have relieved. On the other side, it was said, that this was not in the nature of the penalty, but the term of the agreement, and the measure of the satisfaction for the contingent incumbrance of dower; and that the court would not have relieved on her release, much less when she was so far from releasing that she brought her writ of dower, and if she had recovered it, and lived several years, the purchaser could have had only the 400*l.* and as he run the hazard of her living, he ought to have the advantage of her dying; and of this opinion was the Lord Chancellor, and decreed accordingly. *Small* v. Lord *Fitzwilliam. Prec. Chan.* 102.

In *Aylet* v. *Dodd*, 2 *Atkins*, 328. and several other cases, it was laid down by Lord *Hardwicke*, that where there is a clause of *nomine pœnæ* in a lease to a tenant, to prevent his breaking up and ploughing old pasture ground, the intention is to give the landlord some compensation for the damage he has sustained, and therefore, in that case, the whole *nomine pœnæ* shall be paid. And in *Rolfe* v. *Peterson. 6 Brown, P. C.* 460 (2d vol. 436. last edit.) the tenant covenanted, that in case any part of the premises, that had not been in tillage within twenty years, should be converted into tillage, he would, for the remainder of the term, pay the further yearly rent of 5*l.* for every acre so converted; the tenant having converted into tillage a parcel of land before covered with furze, and an action being brought against him for this, and other breaches of covenant, and 300*l.* damages being recovered upon a judgment by default, Lord *Camden* directed an issue *quantum damnificatus*, ordering that the damages upon each breach of covenant should be found separately. Upon appeal to the House of Lords, in opposition to the argument, that the damages were increased to so high a sum by means of the covenant to pay the increased rent, which was to be considered as a penalty, and that the court of equity could relieve against it, it was said that this was not a penalty, but a liquidated satisfaction, fixed and agreed upon between the parties, and was reserved

reſerved as an additional rent; whereas a penalty is a forfeiture for the better enforcing a prohibition, or a ſecurity for the doing ſome collateral act. On the other ſide, it was ſaid that theſe rigorous covenants, though ſeemingly made for the preſervation of eſtates, are in effect a new mode of raiſing rents, more oppreſſive than the proceeding by ejectment, and are not in the nature of a contract, but of a penalty of vindictive damages; and therefore, ought to receive no countenance in equity, as the penalty thereby reſerved frequently exceeds the value of the inheritance. But the decree was reverſed.

A leaſe for lives was made at the yearly rent of 125*l.* with a clauſe, that if the tenant and his heirs, with all their family, did not live on the premiſes during the continuance of the leaſe, the rent ſhould be raiſed to 150*l.* An action at law having been commenced upon this clauſe, the Court of Exchequer in *Ireland* granted an injunction; upon appeal to the Houſe of Lords it was argued in ſupport of the decree, that the covenant being inſerted only for the ſake of improvement, and to ſecure the rent reſerved, the ſame had been ſubſtantially performed, and the deſign thereof anſwered; for it was admitted, that the lands were kept well ſtocked with more than ſufficient to anſwer the rent; but the decree was reverſed. *Ponſonby* v. *Adams*, 6 *Br. P. C.* 407. (laſt edit. 2 vol. 431.)

In *Roy* v. Duke of *Beaufort*, 2 *Atkins*, 190. the plaintiff and his ſon, while the ſon was in cuſtody on the information of the duke's gamekeeper, for carrying a gun, gave a bond, that the ſon ſhould not commit any treſpaſs in the duke's royalties, by ſhooting, hunting, fiſhing, &c. unleſs with the licence of the gamekeeper, or in company with a qualified perſon. The ſon having caught two flounders with an angling-rod, in company with two ſervants of the duke, one of whom (a brother-in-law of the gamekeeper) invited him to go angling with them; the bond was put in ſuit, and a verdict obtained on the evidence of theſe ſervants, for the penalty, which, with 40*l.* for coſts, the plaintiff (his ſon being dead) was obliged to pay. Upon a bill filed by him for relief, the following queſtions were made: 1ſt, Whether the bond was obtained by oppreſſion and impoſition? 2d, Whether it ſhould be only conſidered as a ſecurity that the ſon ſhould not poach for the future? 3d, Whether an ill uſe had been made of the bond? Lord *Hardwicke*, upon the firſt queſtion, expreſſed his opinion in favour of the bond, and in the courſe of it, obſerved, in anſwer to an argument that the penalty was exceſſive, that to be ſure the penalty was a large one; but he did not know that courts of equity, where bonds have been entered into voluntarily, have ever gone ſo far as to take into their conſideration the greatneſs or the ſmallneſs of the penalty: he ſhould be

extremely cautious how he gave an opinion that would ſet aſide ſuch bonds, which, if rightly uſed, might be of great ſervice in the preſervation of the game, and an equal benefit to the obligors themſelves, by taking them out of an idle courſe of life, which poaching naturally leads them into. As to the head of ſecurity, he ſaid, that it was moſt abſurd, to think that bonds of this kind were intended merely as a ſecurity, and that nothing was to be recovered upon them. He was of opinion, that when theſe kinds of bonds were given by way of ſtated damages between the parties, it was unreaſonable to imagine, that they could only be intended as a bare ſecurity that the obligor ſhould not offend for the future. "Was this the caſe (he ſaid) in what reſpect is a gentleman, who has taken ſuch a bond, in a better condition than he was before, if, after he has obtained judgment at law, a court of equity will give him no other ſatisfaction than the bare value of the price of the game that is killed. Upon the third point, he obſerved, that from the year 1729, when the bond was given, no evidence was offered of the ſon poaching until 1732 (*a*); and after killing theſe flounders, it reſts two years, and no action is brought (*b*); afterwards, the plaintiff in equity was a witneſs againſt the two ſervants for a riot, and they were convicted chiefly on his evidence. It is a very material circumſtance, that the ſon had a licence (*c*), or at leaſt an encouragement, to fiſh, by being in company with two of the duke's ſervants (*d*) (one of whom was brother-in-law to the gamekeeper) (*e*). It frequently happens, that there may be a juſt cauſe of action, yet the real motives may be very unjuſt, which a court of equity will always take into their conſideration, though they cannot at law pay any regard to it (*f*). It appears, that the gamekeeper, who

(*a*) Would not ſuch evidence have been irrelevant? *Atkins* does not ſtate the proceedings at law, but from the nature of the thing, there muſt have been a plea, alleging that the ſon had not treſpaſſed contrary to the condition of the bond, to which the replication muſt have anſwered, with ſtating a particular treſpaſs; to have ſtated more treſpaſſes than one, would have been bad, as being multifarious, except as to the effect of the ſtatute of *William*, which had not at that time been applied to ſuch bonds as theſe, and which is not at all adverted to; and as one only was alleged, one only could be proved. If the ſon the minute after giving the bond had ſhot a partridge before the duke's face, would not this have been a breach againſt the full intention of the bond? But what diſtinction can reaſonably be made, as a matter of legal enquiry, between one time and another, when there is no diſtinction by the contract itſelf?

(*b*) If a right of action once attached, in how ſhort a ſpace of time was it requiſite that the action ſhould be brought, ſo as it was not barred by any ſtatute of limitations?

(*c*) This is quite out of the queſtion.

(*d*) Can a man's legal right be prejudiced by his ſervant having, without his authority, concurred in the violation of it?

(*e*) What difference does this make?

(*f*) This appears to be a moſt dangerous doctrine. Where a man has a legal right, the motives which induce him to exerciſe that right, or to forbear from the exerciſe of it, muſt

who had the authority of the duke, who has been a witneſs to the tranſaction of the bond (*a*), gave a licence, or at leaſt an encouragement (*b*), to this fiſhing, which, as it was with an angling rod only, cannot be called poaching, nor was it ever ſo eſteemed (*c*). In ſuch a tract of time as two years, it is impoſſible to ſuppoſe that the gamekeeper could be ignorant of this fiſhing, eſpecially as his own brother-in-law was in the company (*d*).

"According to the condition of this bond, the plaintiff could not be relieved at law, becauſe his ſon could not fiſh without expreſs leave from the gamekeeper, or in preſence of a qualified perſon, ſo that if the Duke of *Beaufort* himſelf (*e*) had given leave, there muſt at law have been a verdict, becauſe it is not within the expreſs terms of the condition of the bond.

"Now when a man has made this moderate uſe of his liberty (*f*) of fiſhing, and manifeſtly appears to have had leave, it would be hard not to relieve againſt the penalty recovered upon this bond at law."

The third point in the preceding caſe, though not immediately referable to the courſe of the preſent diſcuſſion, is inſerted to ſhew the real ground upon which the caſe was determined; a ground that appears to me to be in every reſpect untenable, and which I

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muſt reſt with himſelf. If he forbears the exerciſe of it, the duration of ſuch forbearance is alſo a matter of diſcretion, until the law has allowed it to operate as a bar. If a ſentiment of perſonal diſapprobation is a ſufficient warrant for a court of equity to defeat the exerciſe of a legal right, the diſcretion aſſumed under this pretence will be ſo illimitable, as to eradicate all the principles of juridical certainty. If up to and at the time of the plaintiff giving evidence againſt the ſervants (who by the bye probably did not, until that time, divulge the circumſtance), the duke had a right of action which a court of equity would not controul him in the exerciſe of, that right could not be defeated by ſuch a circumſtance taking place.

(*a*) What then?

(*b*) Gave a licence, that is, did not give a licence, but gave an encouragement; the meaning of which does not appear, except as it may be inferred from what follows, that he probably would; therefore, that he actually did know of the circumſtance within two years afterwards.

(*c*) The word poaching does not occur in the condition of the bond; but if he ſhall *treſpaſs by fiſhing*, the obligation ſhall be in force. The act againſt ſtealing fiſh is held to extend to angling.

(*d*) Is there any preſumption *juris et de jure*, that a man is cognizant of every act done in the preſence of all his brothers-in-law; and to what further degrees of relationſhip is the principle to be carried?

(*e*) Here another principle would apply to prevent a perſon taking advantage of a penalty incurred by his own act or conſent; but that is a principle totally inapplicable to the preſent queſtion. The condition might have been made general, without including an exception of the conſent of the gamekeeper. When a particular exception is introduced, referable to one caſe, it is not the province of courts of juſtice to create a more extenſive exception not contemplated by the contracting parties.

(*f*) What liberty? What leave? He either had leave from the gamekeeper, or he had not. If he had, it was a defence at law, but the whole caſe aſſumes that he had not, and that the bond was legally forfeited.

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have commented upon in the notes with a freedom which may perhaps be regarded as arrogance, but which I muſt always aſſert as the privilege of a writer, who wiſhes to extend his enquiries beyond the mere collection of authorities, and to inveſtigate the principles of his ſubject (*a*).

Upon the ſecond point, I conceive the opinion of the eminent magiſtrate to be founded upon the moſt correct principles of juridical reaſon; and I am perſuaded, that if theſe principles had been more extenſively acted upon than they have been, the true object of penal obligations would have been more effectually promoted. If the penalties had been allowed to operate really *in terrorem*, by being actually levied, when legally incurred, agreements would be more faithfully performed, from a terror of the conſequences of their infraction; but the ſcarecrow doctrine of penalties being ſtipulated, merely *in terrorem*, whilſt they are known to have no efficient power, is little more than a trifling with language. No penalty is requiſite to render a perſon liable to the damages which may be proved to have ariſen from the non-performance of his agreements, but by a real liability to an actual penalty, ſuch non-performance will commonly be prevented.

In the following caſe, a bond was given by the plaintiff to the defendant, who was a hair-merchant, as a ſecurity for his ſervice and behaviour in *Flanders*, as an agent for the defendant in buying hair there; the plaintiff was to ſtay abroad till a certain ſeaſon, and as a ſecurity for his performance of the agreement he depoſited 100*l.* in the hands of the defendant. The plaintiff bought but 5*l.* worth of hair for the defendant, and returned to *England* before the time agreed between them; and brought a bill for 50*l.* agreed to be paid for his trouble, and alſo for the depoſit. It was inſiſted for the defendant, that this was a breach of the plaintiff's duty, and a forfeiture of the bond, and that the defendant had a right to retain the 100*l.* in ſatisfaction of the penalty, and that the Court would

(*a*) The general doctrine of preventing an ill uſe being made of a bond is properly applicable to a ſubject of a different nature, and is principally inſtanced in the caſe of general bonds of reſignation, which, when they were allowed to be valid in point of law, were prevented by courts of equity from being made the cover of ſimony; and, in any other caſe, a court would prevent a legal contract from being uſed as the engine of an illegal purpoſe. That Lord *Hardwicke* ſhould, from a ſentiment of diſapprobation of the conduct of the Duke of *Beaufort*, have reſorted to ſuch reaſoning as has been ſtated, would ſeem a caution againſt looking in legal proceedings at any other object than the true legal grounds of judicial determination. An objection which might have deſerved ſome attention in the principal caſe, *viz.* that the contract was repugnant to a principle of law, inaſmuch as it was made by way of compoſition for dropping a criminal proſecution, was not made a point in the caſe (except as connected with the adventitious circumſtance of oppreſſion). The deciſions in ſubſequent caſes would give conſiderable weight to ſuch an objection, if the queſtion ſhould hereafter ariſe.

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not relieve againſt it, for it was the ſtated damages between the parties, and the counſel cited the above caſe of the Duke of *Beaufort*, and likewiſe compared it to the caſe of *nomine pœnæ* in leaſes. The Lord Chancellor ſaid, he could not decree this penalty, becauſe it was a bond for ſervices only, and different from the caſes of a *nomine pœnæ* in leaſes, to prevent a tenant from ploughing, becauſe that was ſtated damages between the parties. Nor was it like the caſe of bonds given as a ſecurity not to defraud the revenue, becauſe there, where a perſon is guilty of a breach, it was conſidered as a crime, and the Court of Chancery would not relieve for that reaſon. Here he could not decree the penalty, but muſt decree an action at law, upon a *quantum damnificatus*, to try how far the defendant had been damnified by the plaintiff's non-performance of his ſervice. *Benſon* v. *Gibſon*, 3. *Atk.* 395. (*a*)

In the caſe of *Hardy* v. *Martin*, 1. *Bro. c.* 418. *n.* one partner, on retiring from buſineſs, gave a bond of 600*l.* to the other, not to carry on the ſame buſineſs within certain limits; and after a verdict at law for the penalty, the Court of Chancery granted an injunction to ſtay execution, and directed an iſſue to take an account of the damage actually ſuſtained.

In caſe of a penalty for non-performance of covenants, or agreements, the Courts of Equity, in like manner, exerciſed a juriſdiction of reſtraining the recovery, to the amount of damage aſſeſſed by a jury. At common law, the rules of pleading, which require iſſues to be taken upon a ſingle point in general, confined the plaintiff to ſtate a ſingle breach of the agreement, for the performance of which the penalty was ſtipulated; but this reſtriction did not exiſt in caſes where the breach of the agreement was ſtated in the declaration, in which the plaintiff may allege his complaint as extenſively as he finds convenient.

(*a*) There ſeems to be an inaccuracy in the phraſe that the court could not decree the penalty, becauſe that expreſſion would be rather applicable to a ſuit by the obligee to enforce the penalty, than to one by the obligor to be relieved from it; but this inaccuracy is more probably imputable to the reporter than to the Lord Chancellor; as to the propriety of the deciſion, though there is not a ſimilarity of circumſtances to the caſes mentioned, there does not appear to be any neceſſary oppoſition of principle; and it is impoſſible to ſuppoſe that the intention of the employer, in requiring the depoſit, was any other than that it ſhould be retained in caſe of the agent's infraction of his duty. In theſe caſes the injury which can be manifeſted by evidence to a jury, is almoſt neceſſarily much leſs than that which is actually experienced by the party.

When the courts adopted the principle above cited, that if a penalty is merely inſerted to ſecure the enjoyment of a collateral object, the enjoyment of the object is conſidered as the principal effect of the deed; if they had gone on to aſk themſelves, How that effect would be moſt fully obtained? they would have probably found the anſwer to be, an enforcement of the penalty when that enjoyment was wilfully withheld.

The diſtinct enunciation of the above principle in the caſe of *Sloman* v. *Walter*, induced me to mention that caſe before the others upon the ſame ſubject, which are anterior to it in point of time.

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By *Stat.* 8 & 9. *W. c.* 11. it is enacted, that in all actions in any court of record, upon any bond, or any penal ſum, for non-performance of any covenants or agreements, contained in any indenture, deed, or writing, the plaintiff may aſſign as many breaches as he thinks fit, and the jury ſhall aſſeſs damages upon ſuch breaches as the plaintiff ſhall prove to have been broken; and if judgment ſhall be given for the plaintiff on *demurrer*, or confeſſion, or by *nil dicit*, the plaintiff may ſuggeſt upon the roll as many breaches as he ſhall think fit, upon which a writ ſhall iſſue to the ſheriff to ſummon a jury before the juſtices of aſſize, to enquire of the truth of thoſe breaches, and to aſſeſs the damages; and upon payment of ſuch damages with the coſts, execution ſhall be ſtayed; but the judgment ſhall remain as a ſecurity, to anſwer for any damages to be afterwards ſuſtained by any future breach.

The natural conſtruction of this act does not ſeem to apply to bonds, with a condition to do or not to do any given act, without there being any other diſtinct agreement, that ſuch act ſhall be done; but in *Collins* v. *Collins*, 2 *Bur.* 824. above cited, where the condition of a bond was that the defendant ſhould pay an annuity to the plaintiff, and ſhould alſo maintain him. Lord *Mansfield* ſaid, "This is an agreement between the parties, and an agreement in writing; the condition of the bond is an agreement in writing, and people have frequently gone into courts of equity upon conditions of bonds as being agreements in writing, to have a ſpecific performance." I cannot help thinking that there is more ingenuity than ſolidity in this reaſoning; for though in equity the condition of a bond is regarded *as evidence of* an agreement, that the act referred to ſhall be done, ſuch conditions are not regarded as agreements at law, and cannot be declared upon as ſuch; and where there was another ſubject to which the words of the ſtatute were naturally applicable, it would have been as well to avoid extending the operation of it to a caſe, that does not naturally preſent itſelf to the mind, as being in the view of the legiſlature, and to which the words can only be applied by a forced and foreign conſtruction. It is however ſettled in conformity with the above opinion, that the ſtatute extends to all bonds for the performance of any condition. *Walcot* v. *Goulding*, 8. *T. R.* 124.

It is now alſo ſettled that the act is compulſory (*a*), and that the plaintiff is not at liberty to proceed for the penalty as at common law, although there have been deciſions, and there ſeems to have been a tacit practice the other way (*b*). *Drage* v. *Brand*, 2 *Wilſ.*

(*a*) For the method of proceeding on the ſtatute, ſee *Williams' Notes*, *Gainsford*, v. *Griffith*, 1 *Saund.* 58. *Roberts* v. *Marriet*, 2 *Saund.* 787.

(*b*) See *Bird* v. *Randall*, poſt.

377. *Goodwin* v. *Crowle*, *Cowp.* 357. *Hardy* v. *Bern*, 5. *T. R.* 636. In the laſt caſe, Lord *Kenyon*, and Mr. Juſtice *Buller*, certified their opinion in writing to the Lord Chancellor, upon a writ of error from a judgment of the Exchequer; they ſtated that it was apparent to them, that the law was made in favour of defendants, and was highly remedial, calculated to give plaintiffs relief up to the extent of the damage ſuſtained, and to protect defendants againſt the payment of further ſums then what was in conſcience due, and alſo to take away the neceſſity of proceedings in equity, to obtain relief againſt an unconſcientious demand of the whole penalty, in caſes where ſmall damages only had accrued (*a*). See alſo *Roles* v. *Roſewell*, 5. *T. R.* 540.

But there are caſes where the penalty ſtipulated by the parties, can be the only true and proper meaſure of juſtice; and though there is a technical diſtinction between a penalty and ſtated damages, to which I am about to proceed, I think it would be in general proper to regard the penalty as ſtated damages, unleſs there is ſome particular reaſon in the nature of the contract to the contrary. Many times engagements are entered into upon conſiderations, wholly ariſing out of the perſonal feelings of the parties. The perſon making ſuch engagement of courſe acts under an adequate inducement, and the perſon who has given that inducement ought not to be deprived of the full ſecurity of an object, the perſonal importance of which can only be juſtly appreciated by himſelf. On the other hand where a bond is evidently a mere bond of indemnity from pecuniary loſs, the extent of the loſs is the extent of the damages. In many caſes, the actual damage which could be brought under the contemplation of a jury muſt be as nothing; and if the nominal ſum awarded in ſuch caſes, was the only conſequence that could attach upon a perſon violating his engagement, the ſanction provided with a view to its real and efficient ſecurity would be wholly fruſtrated. I ſhall have an opportunity preſently of referring more conveniently to a caſe in which this ſentiment was judicially adopted.

In all the caſes above mentioned, where it was held that equity could not relieve againſt the ſum agreed upon by the parties, I

(*a*) The act is penned in a moſt careleſs manner, but I think that this is evidently the true conſtruction of it upon the point in queſtion, and that the act is compulſory upon the plaintiff as to aſſigning ſome breach, but was diſcretionary merely as to the number of breaches. In any other point of view there would be a manifeſt abſurdity, in providing that the plaintiff might aſſign as many breaches as he pleaſed, upon judgment on *demurrer* &c. and damages ſhou'd be aſſeſſed, &c. for before that time he might take his judgment and execution for the whole penalty, without aſſigning any breach at all; and giving him an option to aſſign a breach to enable him to recover a part of the penalty, inſtead of taking the whole without having recourſe to that proceeding, would not be productive of any extenſive practical conſequence.

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conceive it may be taken for granted, that the ſum ſtipulated to be paid is the only proper meaſure for the deciſion of the jury; and whether the form of the tranſaction is held to be a penalty or ſtipulated damages, (the line of diſcrimination between which is not very accurately marked,) the ſum ſo agreed is the amount which ought to be recovered.

In the caſe of *Lowe* v. *Peers*, 4 *Burr.* 2225, the defendant promiſed the plaintiff, that he would not marry any perſon beſides herſelf, and that if he did, would pay her (the plaintiff) 1000*l.* (*a*) at the end of three months. Lord *Mansfield*, after ſtating the proceedings in the cauſe, ſaid, that the jury had given 1000*l.* damages; and by law, and in juſtice, the defendant ought to pay the 1000*l.* Money is the meaſure of value. Therefore what elſe could the jury find but this 1000*l.* (unleſs they had alſo given intereſt after the three months). This is not an action brought againſt him for not marrying her, or for his marrying any one elſe; the non-payment of the 1000*l.* is the ground of the action. The money was payable on a contingency, and the contingency has happened, therefore it ought to be paid. There is a difference between covenants in general, and covenants ſecured by a penalty or forfeiture. In the latter caſe the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty, after which recovery of the penalty he cannot reſort to the covenant, becauſe the penalty is to be a ſatisfaction for the whole; or, if he does not chooſe to go for the penalty, he may proceed upon the penalty, and recover more or leſs than the penalty, *toties quoties*. And upon this diſtinction they proceed in courts of equity. They will relieve againſt a penalty upon a compenſation; but where the covenant is to pay a particular liquidated ſum, a court of equity cannot make a new covenant for a man; nor is there any room for compenſation or relief, as in leaſes containing a covenant againſt ploughing up a meadow: if the covenant be not to plough, and there be a penalty, a court of equity will relieve againſt the penalty, *or will even go further than that*, to preſerve the ſubſtance of the agreement; but if it is worded, to pay 5*l.* an acre, for every one ploughed up, there is no alternative, no relief againſt it, no room for compenſation; it is the ſubſtance of the agreement. Here the ſpecified ſum of 1000*l.* is found in damages (*b*); it is the particular liquidated

(*a*) The promiſe was held to be void, but the amount which ought to be recovered, ſuppoſing it to be good, was previouſly diſcuſſed, which perhaps was neceſſary in regard to the queſtion of coſts.

(*b*) His Lordſhip at the trial directed the jury to find for the plaintiff with 1000*l.* damages, *if they thought the deed a good one.* This laſt, by the bye, was rather an odd point to leave to a jury.

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ſum fixed and agreed upon between the parties, and is therefore the proper quantum of the damages. It is clear that where the preciſe ſum is not the eſſence of the agreement, the quantum of the damages may be aſſeſſed by the jury; but where the preciſe ſum is fixed and agreed upon between the parties, that very ſum is the aſcertained damage, and the jury are confined to it.—And the other judges gave their opinions to the ſame effect.

Where perſons contracting for the iron-work of a building, agreed to perform it in ſix weeks, and to pay 10*l.* a-week afterwards until it was done, and gave a bond in a penalty for the performance, it was held that the 10*l.* a-week was in the nature of liquidated damages; and it was ſaid by Mr. Juſtice *Aſhhurſt*, that the object of the parties in naming this ſum, was to prevent any altercation concerning the quantum of damages, which might have been ſuſtained by the non-performance of the contract. It would have been difficult for a jury to have aſcertained what damages had really been ſuffered by the breach of the agreement; ſo that it was a caſe of ſtipulated damages, and was not to be conſidered as a penalty. Mr. Juſtice *Buller* ſaid, that when there is a penalty in the bond, it was ſtrange that the ſum mentioned in the condition ſhould be called a penalty; he did not know that there could be an equitable and a legal penalty; but that was as ſtrongly a caſe of liquidated damages as could poſſible exiſt, and was like the caſe of demurrage. In either caſe it is impoſſible to aſcertain what the damages are, and the parties agree to pay a ſtipulated ſum. *Fletcher* v. *Dyke*, 2. *T. R.* 32.

In *Aſtley* v. *Weldon*, 2 *Boſ.* 346. the defendant engaged to perform at the plaintiff's theatre for a certain time, and to attend performances and rehearſals, or ſubject herſelf to the fines eſtabliſhed at the theatre. There were alſo ſeveral agreements on the part of the plaintiff. "And it was agreed between the parties, that either of them neglecting to perform the agreement ſhould pay to the other 200*l.*" The plaintiff brought an action againſt the defendant, for refuſing to perform, and for wholly withdrawing from the theatre; and the declaration concluded, with ſtating that by reaſon thereof ſhe became liable to pay the ſum of 200*l.* in the articles mentioned. It being proved that the agreement was broke by the defendant abſenting herſelf, and evidence having been given that by the regulations of the theatre, the performers were ſubject to certain ſmall fines for inebriety, late attendance, &c. a verdict was found for the plaintiff with 20*l.* damages, with liberty for the plaintiff to enter a verdict for 200*l.* damages, if the court ſhould be of opinion that the ſum mentioned in the agreement, was to be conſidered in the nature

of liquidated damages. After argument, it was held that the queſtion of damages was properly left to the jury. Lord *Eldon* ſaid, that when the cauſe came before him at *niſi prius*, he felt, as he had often done before in conſidering the various caſes on this head, much embarraſſed in aſcertaining the principle upon which thoſe caſes were founded; but it appeared to him that the articles in this caſe, furniſhed a more ſatisfactory ground, for determining whether the ſum of money therein mentioned ought to be conſidered in the nature of a penalty or of liquidated damages, than moſt others which he had met with; what was urged in the courſe of the argument had ever appeared to him to be the cleareſt principle, viz. that where a doubt is ſtated whether the ſum inſerted be intended as a penalty or not, if a certain damage leſs than that ſum is made payable upon the face of the ſame inſtrument, in caſe the act intended to be prohibited be done, that ſum ſhall be conſtrued a penalty. The caſe of *Sloman* v. *Walter*, did not ſtand in need of this principle; for there, by the very form of the inſtrument, the ſum appeared to be a penalty, in which caſe a court of equity could never conſider it as liquidated damages, but muſt direct an iſſue of *quantum damnificatus*. A principle has been ſaid to have been ſtated in ſeveral caſes, the adoption of which one cannot but lament, namely, that if the ſum would be very enormous and exceſſive, conſidered as liquidated damages, it ſhall be taken to be a penalty, though agreed to be paid in the form of contract. This has been ſaid to have been ſtated in *Rolfe* v. *Peterſon*, where the tenant was reſtrained from ſtubbing up timber. But nothing can be more obvious than that a perſon may ſet an extraordinary value upon a particular piece of land or wood, on account of the amuſement which it may afford him. In this country a man has a right to ſecure to himſelf a property in his amuſements, and if he chooſe to ſtipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given ſum of money upon every load of wood cut and ſtubbed up, he ſaw nothing irrational in ſuch a contract; and it appeared to him extremely difficult to apply with propriety the word "exceſſive," to the terms in which parties chooſe to contract with each other. His Lordſhip made ſome obſervations upon the preceding caſes on this ſubject, and ſaid that with reſpect to *Hardy* v. *Martin*, he did not underſtand why one tradeſman, who purchaſes the good-will of a ſhop from another, may not make it a matter of agreement, that if the vendor trade in the ſame article within a certain diſtance, he ſhall pay 600*l.* and why the party violating ſuch agreement ſhould not be bound to pay the ſum agreed for; though if ſuch agreement were entered into in the form

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of a bond, with a penalty, it might perhaps make a difference (*a*). In his obſervations upon the particular caſe, his lordſhip referred to the pecuniary payments agreed to be made by the plaintiff, and alſo to the ſmall fines, which, according to the regulations of the theatre, were to be paid by the defendant; inferring that in theſe caſes the ſum of 200*l.* was only to be regarded as a ſecurity for the ſtipulated payments; and that there was not any ground for diſtinguiſhing between theſe and the other parts of the agreement. Mr. Juſtice *Heath*, in the courſe of his opinion ſaid; it was very difficult to lay down any general principle in caſes of this kind, but he thought there was one which might ſafely be ſtated; that where articles contain covenants for the performance of ſeveral things, and then one large ſum is ſtated at the end to be paid upon breach of performance, that muſt be conſidered as a penalty; but where it is agreed that if a party do ſuch a particular thing, ſuch a ſum ſhall be paid by him, there the ſum ſtated is treated as liquidated damages. Mr. Juſtice *Chambre* ſaid, that though in point of form the action was for damages, yet if the parties are to be conſidered as having ſtipulated for certain damages, the jury ought to be directed to find damages, to the amount of the whole ſum ſo agreed for, and the effect of the caſe muſt have been the ſame, as if the plaintiff had declared in debt for a penal ſum. After taking notice of ſome of the deciſions above cited, he ſaid, there is one caſe in which the ſum agreed for muſt always be conſidered as a penalty, and that is, where the payment of a ſmaller ſum is ſecured by a larger: in this caſe, it is impoſſible to garble the covenants, and to hold that in one caſe the plaintiff ſhall only recover for the damages actually ſuſtained; and in another, that he ſhall recover the penalty: the concluding clauſe applies equally to all the covenants. With reſpect to the caſe of *Hardy* v. *Martin*, in which he was concerned, Lord *Mansfield*, upon the trial at law, inclined to think it a caſe of ſtipulated damages: though it appeared by the printed report, that it was conſidered otherwiſe in a court of equity (*b*).

In *Legh* v. *Lewis*, a bond was given by the defendant to the plaintiff in 400*l.* to reſign the ſituation of maſter of a ſchool at

(*a*) If ſuch was admitted to be the real intention of the parties, there can be no foundation for a court of equity, whoſe peculiar province is to preſerve and maintain the ſubſtance of tranſactions, to ſubvert both form and ſubſtance, in a manner which renders the tranſaction itſelf wholly nugatory. The damage which can be actually proved in ſuch caſe as this muſt in general be nothing, becauſe it is very difficult to ſhew that the profit received by the one, would in particular caſes have otherwiſe fallen to the other; but the real injury ſuſtained by continuing the trade in violation of the agreement, may at the ſame time incalculably exceed the ſtipulated penalty.

(*b*) This caſe would regularly come before Lord *Mansfield* a ſecond time, upon the iſſue directed by the Court of Chancery, and perhaps it was upon that occaſion that he expreſſed the opinion alluded to: for a direction to the jury that they had no other guide, than the penalty in the bond would certainly be more proper and judicious than any other.

Knutsford upon the plaintiff's requeſt; the validity of this bond was eſtabliſhed upon demurrer, by the Court of King's Bench, 1 *Eaſt*, 391. The caſe afterwards came on at *Cheſter* aſſizes for an inquiry of damages: on the one hand, it was contended that as the plaintiff had not any perſonal intereſt, the damages ſhould be merely nominal; on the other hand, that they ought to be given for the entire penalty. Mr. *Manſfield*, and Mr. *Burton*, the juſtices of *Cheſter*, ſupported this latter opinion in a very elaborate diſcuſſion of the ſubject, and the damages were found accordingly; the judges conſidering that it was the intention of the parties, that an actual liability to the penalty ſhould operate as a ſanction, for the performance of the primary obligation to reſign (*a*).

From the above ſeries of caſes which I have cited, at much greater length than is conſiſtent with my general plan, it is obviouſly no eaſy matter to determine, in what caſes the ſanction, intended by the parties to enforce the performance of their engagements, ſhall or ſhall not be permitted to take effect. But in framing an inſtrument for this purpoſe, I think the beſt way will be to expreſs the condition or engagement, in terms declaring "that the party ſhall do, or not to do the act intended, or in default thereof ſhall pay the ſum of ——— *as and for ſtipulated damages, for the ſame;*" and alſo to inſert as a penalty, a larger ſum than that agreed to be payable as ſtipulated damages: and in caſe it is intended that the party making default ſhall be liable to pay a certain ſtipulated ſum, but that the other ſhall not loſe his right to general damages, to add, "and ſuch further damages as the ſaid ——— ſhall in that behalf ſuſtain;" or otherwiſe to add a *proviſo*, "that the damages above ſtipulated ſhall not prejudice the right of the ſaid ——— to ſue for any other or greater damages, for and on account of the non-performance of the agreement."

Bonds given in a larger ſum of money, for ſecuring the payment of a ſmaller, at a very early period attracted the notice of courts of equity, and were reduced to what was deemed their true intention; a ſecurity only for the principal and legal intereſt. Lord *Manſfield* has, upon different occaſions, reprehended the courts of law for not adopting the ſame principle, and rendering it neceſſary to reſort to a court of equity for the reduction of the penalty. In *Wyllie* v. *Wilkes*, *Doug.* 501. ſpeaking of the act 4 & 5 *Ann.* which will

(*a*) I regret that I am not able to furniſh a more full account of a judgment from the good ſenſe and learning of which I received peculiar gratification, at the time of its being pronounced, than the following very ſhort note by Mr. *Wigley*, (who was counſel in the cauſe) of the opinion of Mr. *Manſfield*. "Here the defendant is to reſign; this is the object of the bond to compel a reſignation. What elſe but the penalty can poſſibly be the meaſure of damages? If this is not the meaſure of damages, the bond is a farce. The plaintiff, to be ſure, might make the defendant pay coſts; but my opinion is, that if he is intitled to recover any thing, it is the whole."

be cited preſently, he ſays, that it was made to remove the abſurdity, which Sir *Thomas More* unſucceſsfully attempted to perſuade the judges to remedy, in the reign of *Hen.* VIII.; for he ſummoned them to a conference concerning the granting relief at law, after the forfeiture of bonds upon payment of principal intereſt and coſts; and when they ſaid that they could not relieve againſt the penalty, he ſwore by the body of God, that he would grant an injunction. And in *Bonafous* v. *Rybot*, 3 *Burr.* 1370, he ſaid, it was ſurpriſing that after the ſtatute of uſury, 37 *Hen.* VIII. which excepts obligations with condition, made upon a juſt and true intent, the courts of law did not conſider the juſt intent of a bond to be principal intereſt and coſts, ſecured by a penalty, and ſuffer the party at any time to ſave the forfeiture by performing the intent. It was more extraordinary, that after this was ſettled in a court of equity, to be the nature of a bond, and therefore every party to a bond underſtood it in this ſenſe, the courts of law did not follow equity, but ſtill continued to do injuſtice, as of courſe; and put the parties to the expence and delay of ſetting it right elſewhere, as of courſe.

The practice of courts of law upon this ſubject was corrected by *St.* 4 & 5 *Ann. c.* 16. *ſ.* 13, which provides, that if at any time pending an action upon ſuch a bond with a penalty, the defendant ſhall bring into the court, where the action ſhall be brought, all the principal and intereſt due on the bond, and all coſts, the money ſo brought in ſhall be deemed a full ſatisfaction, and diſcharge of the bond.

In the before mentioned caſe of *Bonafous* and *Rybot*, it was made a queſtion, whether a bond for payment of money by inſtalments, was within the proviſions of the act? upon which Lord *Mansfield* ſaid, that the act reforms, in ſome inſtances, an erroneous courſe of proceeding which ought never to have prevailed, and which the courts themſelves might, and ought to have remedied, but did not. Therefore, it ſhould not only have the moſt liberal conſtruction, but the courts ought to exerciſe their own authority, to extend the ſpirit and reaſon of this parliamentary interpoſition for the eaſier, ſpeedier, and better advancement of juſtice, to caſes not mentioned in the act. After making the obſervations before cited, he added, that the act meant that in caſes of penalties by way of ſecurity, the clear final juſtice of the caſe ſhould be attained in the courts of law, much to the benefit of both parties: that he could not ſee a doubt upon bonds conditioned for payment of money by inſtalments, (*a*) and he was glad to hear it had been ſo determined; that

(*a*) But the act inaſmuch as it directs that "the money brought in ſhall be taken to be a full ſatisfaction and diſcharge of the bond," cannot be applied to this caſe without injuſtice,

that the defeazance being dated at a ſubſequent time, and written on a diſtinct paper, makes no difference. The diſcuſſion upon this ſubject was however merely incidental; the ground of deciſion in the cauſe will appear in the courſe of the preſent diſſertation.

In *Wyllie* v. *Wilkes*, Lord *Mansfield* intimated an opinion, that bonds for the payment of an annuity were within the reaſon, though not within the letter of the ſtatute; he alſo thought, that payment of the annuity after the day would ſave the forfeiture of the bond. The point decided was, that where the bond had once become abſolute by the annuity not being paid at the day; the value of the annuity might be recovered as a debt, under a commiſſion of bankrupt, although no payment was in arrear at the time of the bankruptcy taking place. Upon this ſubject Lord *Mansfield* ſaid, it was a pity that the legiſlature ſhould be ſilent, and ſhould force the courts, in order to attain the ends of juſtice, to invent legal ſubtleties which do not come up to the common underſtanding of mankind. That has been done in caſes of annuities. The Court of Chancery has laid hold of this ſubtlety; it has ſaid, the penalty is the debt, if the forfeiture has been once incurred; and you may have a value ſet upon your annuity, and come in as a creditor, under the commiſſion. It was objected that the forfeiture was waved: the court anſwers, no matter for that, it ſhall be ſtill in force, becauſe it is for the benefit both of the creditor and the bankrupt, that it ſhould be ſo. This has been ſettled, and we all adhere to the determination as far as this caſe goes, as a legal ſubtlety, eſtabliſhed for good purpoſes, but not to be drawn into principle or argument in other caſes.

Although in point of fact, a creditor may ſuffer the moſt ſerious miſchief from the want of punctual payment of his debt, as happens every day, and a ſubſequent payment of principal, and intereſt, may be a very inadequate compenſation for the original diſappointment, it may be ſtated as a general rule that a promiſe of paying a penalty, beyond the amount of legal intereſt, cannot be enforced. In one caſe, where goods were ſold with an agreement to pay a halfpenny an ounce *per* month, (which rather exceeded the legal rate of intereſt) it was held that the agreement might be enforced, being according to the general uſage and practice of the particular trade, *Floyer* v. *Edwards*, *Cowp.* 112. But in a late caſe, where certain bleachers agreed to allow a diſcount of 30 *per cent*, in caſe of prompt payment, the commiſſioners of bankrupt only allowed

juſtice, and certainly would not be ſo applied. Before judgment, the proper courſe ſeems to be a rule to ſtay proceedings; and after judgment, a rule to ſtay execution, letting the judgment ſtand as a ſecurity for future payments.

a proof

a proof of the ſum, to which the debt would have been thereby reduced, with an addition of five *per cent.* the Lord *Chancellor* ſaid, that the trade of a gold refiner, upon which *Floyer* & *Edwards* aroſe, had been turned into a cover for uſury; the cuſtom of the trade could not make the debt more than the money *really advanced*, with 5*l. per cent.* The creditor cannot have more than 5*l. per cent.* and the commiſſioners have done right; *Ex parte Aynsworth*, 4 *Veſ.* 678.—When the Lord Chancellor referred to money really advanced, he ſeems to have had a ſlight view to the real nature of uſury, which is eſſentially founded upon a loan, either real or colourable, and is not referable to other contracts confeſſedly of a different nature. If ſuch other contracts are reſorted to, as the colour and diſguiſe of what is actually intended as a loan, it is certainly proper that the conſequences of uſury ſhould attach; but modern caſes afford numerous other inſtances, in which the original nature of uſury, as regarded both by the authorities of the *Engliſh* law, and by all foreign juriſts, ſeems to have been entirely diſregarded, and the conſequences of it extended far beyond its regular limits; a ſubject upon which at preſent it would be irrelevant to enlarge, but upon which I hope in a future eſſay to enter into a more particular examination (*a*).

Where a bond is entered into with a penalty, and it is neceſſary to proceed upon that ſecurity, it ſeems to be ſettled as a general rule, that nothing more can be recovered than the amount of ſuch penalty, with nominal damages for the detention of the debt. A diſtinction has been taken in courts of equity, that where the obligee is plaintiff, a court of equity will not carry the debt beyond the penalty, becauſe he has choſen his own ſecurity, and made himſelf judge what recompence he ſhall have, in caſe the debtor

(*a*) With reſpect to the caſe laſt cited, it is certainly foreign to the real principles of uſury, to apply the laws upon that ſubject to an engagement, for taking leſs than the ſtipulated price of goods or labour upon the condition of immediate payment; and to reduce the price agreed to be paid in default of ſuch condition, to that agreed to be received in caſe of its performance. But upon another ground, I think the deciſion might fairly be ſupported; for it is manifeſt that theſe exceſſive diſcounts are not really intended by the parties, as compenſatory of promptneſs of payment, and that in fact they are allowed after the expiration of a conſiderable lapſe of credit, no accounts ever being ſettled upon the footing of the nominal price, when the debtor continues ſolvent. The object of them is to ſecure a diſproportionate advantage in caſe of inſolvency, and by obtaining a dividend of 15*s.* in the pound upon a nominal ſum, the whole debt really intended to be paid after deducting the nominal diſcount, would be ſecured to the prejudice of the general creditors; ſo that in fact the nominal price is merely a form and colour to the tranſaction, contrary to the real intention of the parties. But every diſcount does not fall within the principles of theſe obſervations, merely upon the ground of its exceeding the legal rate of intereſt; for in many caſes, the actual benefit of immediate payment greatly exceeds the amount of a year's intereſt on the debt. In fact, there ſeems no reaſon at all to conſider the amount of a year's intereſt as the legal ſtandard of allowance, unleſs the period of a year is ſtipulated for the duration of the credit.

pays him not, or performs not his agreement, and there is no equity that his ſecurity ſhall be bettered or enlarged for him. 1 *Eq. Ab.* 92. But where an action was brought upon a bond, in the penalty of 140*l.* conditioned for the payment of 72*l.* and the obligor, after ſeveral delays at law, preferred a bill ſuggeſting fraud and want of conſideration, and praying a diſcovery, and a croſs bill was filed praying a diſcovery if the bond had not been executed; it was ordered that the obligor ſhould not be relieved againſt the penalty of the bond, and that it ſhould be referred to the maſter to compute the principal money, and intereſt due thereon, and to tax the coſts of the obligee both at law and in equity, and that what ſhould be found due for principal, intereſt, and coſts, ſhould be paid by the obligor. The maſter computed the principal and intereſt at 154*l.* (which as it may be collected, though it is not ſtated in the report, was ordered to be paid.) Upon an appeal to the Houſe of Lords, it was made a queſtion, whether the court of equity could juſtly award more than the penalty; and it was objected, that the order being to ſave againſt the penalty, no more ought to be decreed. But it was ſaid that notwithſtanding that, when the ſame was referred to a maſter to tax principal and intereſt, the order bound the party to pay both, though it was more than the penalty; and the meaning of the firſt part was only to relieve againſt the penalty, in caſe the principal and intereſt came to leſs than the penal ſum, eſpecially the ſame coming to be heard upon croſs bills, and as this caſe was circumſtanced after ſuch delay, and upon ſuch pleading in the Court of King's Bench. And the decree was affirmed. *Duvall* v. *Terrey*, *Sho. P. C.* 15.

In the courſe of proceedings at common law, when judgment is given for a penalty in an action of debt, a further ſum is added as damages for the detention of the debt; this is uſually the nominal ſum of 1*s.* and when a larger ſum than the penalty can be allowed to be recovered, it is by increaſing thoſe damages. In *Holdipp* v. *Otway*, 2 *Saund.* 102. the earlieſt caſe upon this ſubject, an obligation was entered into (by ſingle bill as it ſeems) in 68*l.* and upon judgment by default in the Court of Common Pleas, the prothonotary, in conſequence of the time which had elapſed, taxed 50*l.* for damages, and intereſt, for the detention of the debt. Upon a writ of error, the only objection was, that the Court had themſelves taxed damages for the detention of the debt, without the intervention of a jury. But the objection was not allowed, for the Court ſaid, that the whole courſe and practice of both courts was upon a judgment in debt, by default or confeſſion to tax the damages on occaſion of the detention of the debt, as well as the coſts of ſuit; and if the Court can tax 20*s.* or any other ſmall ſum for damages,

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on occaſion of the detention of the debt, for the ſame reaſon they may tax 20*l.* or other greater ſum for damages, if they ſee cauſe.

The preceding caſe does not at all turn upon the propriety of allowing damages, under particular circumſtances, but ſolely upon the manner in which thoſe damages were adjudged; and it is certainly true that if a judgment for one ſhilling damages, is not error on the record, neither is a judgment for two ſhillings, or ten ſhillings, or ten pounds, or any larger ſum; and I do not ſee that any diſtinction can be made in reſpect to the preſent ſubject, between an obligation by ſingle bill, for the money actually intended to be paid, and an obligation conditioned to be void upon the payment of a ſmaller ſum, or upon ſome other contingency; for, in the latter caſe, the ſum ſpecified in the obligation is the legal debt; the detention of which debt is the foundation of the damages, and it certainly would be repugnant to the nature of the proceeding, to allow any larger damages than thoſe which are adapted to the mere detention of the debt.

In *Brangevin* v. *Perrot*, 2 *Bl. Rep.* 1190. a motion was made to pay the whole penalty of a baſtardy bond into court, with coſts; which was oppoſed, on the ground that the action was for a ſingle breach of the bond, on which the plaintiff was intitled to recover; after which the penalty ſhould ſtill remain in full force, to anſwer ſubſequent breaches as they might ariſe *in infinitum*; but it was ſaid by the Court that this was ſo plain a caſe, that they did not know what could be ſaid to make it clearer. The bond aſcertains the damage by the conſent of the parties; if, therefore, the defendant pays the plaintiff the whole ſtated damages, what can he require more?

In *White* v. *Sealey*, *Doug.* 49. the defendants had entered into a bond of 600*l.*, conditioned for the payment of a rent of 570*l.*, by another perſon upon a leaſe of 21 years. After judgment by default in an action on this bond, a ſecond action was commenced, and a ſecond judgment entered up; and the defendants obtained a rule to ſhew cauſe, why, upon payment of the penalty and coſts, the plaintiff ſhould not acknowledge ſatisfaction on the record; it being ſworn that they had conceived the ſecond action to be the ſame as the firſt, and the declaration to have been only delivered to cure a miſtake in the proceedings. The queſtions were, whether the bond in this caſe was a ſtanding ſecurity for all the payments of rent, during the term, or only to the amount of the penal ſum? 2d, Whether, upon the equity of the caſe, and an affidavit on the part of the plaintiff, it did not appear that it was the intention of the parties, that the defendant ſhould be bound for the rent during

the whole term, ſo as to entitle the plaintiff to retain the advantage he had got by miſtake of the defendant (*a*)? Mr. Juſtice *Buller* at firſt was ſtrongly of opinion, on the firſt point, (which had not been made at the bar) that by the ſtatute of 8 & 9 *W.* 3. *c.* 11. an obligee of ſuch a bond as this might from time to time aſſign breaches, and recover his damages, and have execution for them, though they amounted to more than the penalty in the bond, and that the judgment would ſtill remain as a ſecurity for all ſubſequent breaches. Mr. Juſtice *Aſhhurſt* obſerved, that that would be very equitable as againſt the leſſee; but extremely hard on ſureties, who only mean to bind themſelves to the extent of the penalty. Lord *Mansfield* ſaid, as the bond is conceived, are the defendants liable for more than the whole penalty? I think not, upon the true conſtruction of the ſtatute of *William*, the meaning of which only was, that a plaintiff ſhould not be obliged upon every breach to go into a court of equity, to have iſſues directed of *quantum damnificatus*. 2d, Is there any thing collateral that ſhould make the ſureties liable for more? I ſee nothing in the facts of the tranſaction that ought to have that effect. The ſlip of not pleading the firſt judgment to the ſecond action only affects the coſts, and not the merits. Mr. Juſtice *Buller* then declared himſelf to be of the ſame opinion, concerning the conſtruction of the ſtatute.

In Lord *Lonſdale* v. *Church*, 2 *T. R.* 388, the defendant had entered into three ſeveral bonds of 2000*l.* each, conditioned to account for all monies received by him, as receiver of the harbour dues of *Whitehaven*; he admitted having received 5400*l.*, but it was conceived that he had received intereſt for ſeveral parts of that ſum; and three ſeveral actions having been brought, he obtained a rule to ſhew cauſe why the proceedings in two of the actions ſhould not be ſtayed, upon payment of the two penalties into court, and why it ſhould not be referred to the maſter to ſee what was due for principal on the other bond, and why on payment thereof proceedings ſhould not be ſtayed. After argument, Mr. Juſtice *Buller* ſaid, he was not ſatisfied with the determination in the caſe of *White* and *Sealy*; he was perſuaded that many caſes had been determined upon the point, though they did not occur to the Court then; and that caſe was not moved again, becauſe it was the caſe of a ſurety. On ſearching, he found ſeveral caſes where the doctrine had been before eſtabliſhed. In *Elliot* v. *Davies*, *Bunb.* 23, intereſt upon a bond was decreed to be paid,

(*a*) There were ſome circumſtances which ſatisfied the Court, that the leſſor was miſled by the ſureties, with reſpect to the ſmallneſs of the penalty.

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though it exceeded the penalty. And in a cafe in the King's Bench, *Tr.* 6 *Geo.* 3. Lord *Mansfield* faid, the penalty is merely a fecurity; and where it is not fufficient, the plaintiff may recover damages, as well as the penalty. Nothing can prove the principle ftronger than the conftant practice of giving 1*s.* damages. He then referred to the cafes above cited, of *Collins* v. *Collins*, *Holdipp* v. *Otway*, and *Duvall* v. *Price*. The Court however faid, that as there appeared to be fome hardfhip in the defendant's cafe, they would let him pay the penalty in the two actions into court, but they would not ftay the proceedings; and then, if the plaintiffs chofe to proceed further, they would do it at the rifk of a jury's not giving more than the amount of thofe refpective penalties. The defendant then confented to have the rule difcharged, and moved to pay money into court, as a motion of courfe; which was permitted. The fubfequent event of this cafe does not appear.

In *Wilde* v. *Clarkfon*, 6 *T. R.* 303, the defendant, in an action on a bond, to indemnify a parifh againft a baftard child, obtained a rule to fhew caufe, why, upon payment of the penalty of the bond with coffs, fatisfaction fhould not be entered on the record, which was oppofed on the authority of the preceding cafe of Lord *Lonfdale* v. *Church*; but Lord *Kenyon* faid, that he could not accede to the doctrine in the cafe cited, as according to that an obligor who became bound in a penalty of 1000*l.*, conditioned to indemnify the obligee, might be called upon to pay 10,000*l.* or any other larger fum, however enormous. Suppofe the plaintiff proceeds in the action, and no defence is made to it, the judgment would be for the penalty of the bond, and 1*s.* nominal damages for the detention of the debt. But here the defendant is willing to pay the whole penalty, and the coffs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal fums for the performance of covenants, &c. the act of parliament expreffly fays, that there fhall be judgment for the penalty, and that the judgment fhall ftand as a fecurity for further breaches; but the obligor is not anfwerable in the whole beyond the amount of the penalty.

A bond having been entered into before the *American* war, in the penalty of 2400*l.* proclamation-money of *South Carolina*, and application having been made in an action on the bond commenced in the year 1792, to pay into court that amount in proclamation-money, and that thereupon all further proceedings fhould be ftayed, it was faid by Mr. Juftice *Buller*, that they fhould do great injuftice by acceding to fuch application. The proclamation-money was of a certain value when the bond was given, and alfo when it was forfeited; but by change of time and circumftances, was rendered

rendered of no value whatever, and therefore it ſeemed that juſtice would not be done between the parties, if the Court were to determine that the defendant ſhould be at liberty to pay that which was then of no value, but which, had he paid his debt when it became due, would have been of great value. *Cuming* v. *Munro*, 5 *T. R.* 87. In two caſes in chancery, which occurred ſubſequent to the caſe of Lord *Lonſdale* v. *Church*, it was determined, that intereſt on a principal ſum could not be carried beyond the penalty of a bond; and alſo, that no intereſt could be allowed on the arrears of an annuity, which there was a bond of 10,000 *l.* to ſettle. *Tew* v. the Earl of *Winterton*. 3 *Bro. Ch.* 48. *Knighton* v. *M'Lean. id.* 496. In theſe caſes, ſeveral authorities were cited, ſome of which ſeem to warrant the determination, but others were alſo cited which would be certainly adequate to maintain the oppoſite propoſition.

Subſequent to all theſe caſes, the following deciſion was made by the Supreme Court of the United States of *America*; the authorities of the *Engliſh* law being, as uſual, fully adduced in the courſe of the argument. The defendant entered into a bond, in the penalty of 5000*l.* with a condition to be void, in caſe he ſhould, within ſix months, obtain a patent for certain lands agreed to be conveyed. Upon an iſſue of performance, the jury gave a verdict for 5000*l.* debt, and 1922*l.* damages, being the intereſt of the penalty, from the expiration of the three months. After a very able argument at the bar, the judges delivered their opinions as follows: *M'Kean*, Chief Juſtice; the only queſtion before the court is, whether the jury had a power under the circumſtances of this caſe, to give any damages beyond the penalty of the bond; the quantum (which might be a ſubject of diſpute on a motion for a new trial) is not at all involved in the point ſubmitted to our deciſion. Of the power of the jury we do not entertain a doubt. Though poſitive law and judicial precedents ſhould be totally ſilent on the ſubject, the principles of morality, equity, and good conſcience, would furniſh an adequate rule to influence and direct our judgment. By that rule we muſt diſcover that the defendant, having contracted to make a conveyance, or to pay a ſpecific ſum, within a limited time, was guilty of an immoral act, in omitting to perform either of the alternatives; and of courſe he ought not to be allowed to be a gainer by the violation of his engagements. It is true, that we cannot compel him ſpecifically to comply with the terms of the contract, as a Court of Chancery might do; but we can enforce the payment of a compenſation for the breach; and as the breach was made in the contract at the end of ſix months, when either the lands ſhould have been conveyed, or the penalty ſhould have been paid, the intereſt (which is a reaſonable and moderate meaſure of damages) ought

ought in juſtice to run from that period. The verdict for the amount is, therefore, in our opinion, moral and equitable; nor is there, I will venture to ſay, any authority to impeach it, upon the ſtricteſt principles of law. *Shippen*, Juſtice; if the jury had undertaken to give more than 5000*l.* for the injury ſuſtained, by the infraction of the original contract, their verdict would have been affected by the caſes that have been cited. But the caſes go no further; and certainly do not deny the right of the jury to make an allowance of intereſt for the detention of the money, after the time limited for its payment. Indeed, the ſtrongeſt poſſible inference to the contrary is to be drawn from the caſes cited by the defendants; for Lord *Mansfield* having aſked what elſe the jury could give than the penalty, expreſsly adds, "unleſs they had alſo given intereſt after three months," ſtipulated in the contract. 4 *Bur.* 2228. In ſhort, the 5000*l.* paid with intereſt at this day is not in fact, or law, more than the 5000*l.* paid, without intereſt, at the day it became due. *Smith*, Juſtice; the plaintiff is clearly entitled to the intereſt on every principle of law, morality, and equity. It would have been ſufficient to me, therefore, if the verdict had been unſupported by any precedent: but I am the more ſtrengthened in my opinion, as not a ſingle authoritative dictum is to be found againſt it. *Yeates*, Juſtice, concurred. By the Court; let judgment be entered for the plaintiff, for damages, intereſt and coſts. *Peut* v. *Wallis*, 2 *Dallas*, 252.

In forming an opinion upon the preceding caſes, I think it is perfectly clear, that the doctrine which would exclude a party from paying the entire penalty, ſo that he might be held afterwards liable, from time to time, to anſwer for the amount of damages accruing to an indefinite extent, cannot be ſupported upon any principles of legal reaſoning. At common law, a perſon ſued in an action of debt could only be ſubject to the payment of the debt which was the object of the demand (with ſuch damages, as under particular circumſtances, might be allowed for the detention of it); the condition providing that ſuch debt ſhould be a penalty for the ſecurity of a collateral object, was matter of defence; ſhewing, that under the circumſtances of the caſe, the debt, which was the formal object of the obligation, did not attach; and this condition, which was in its nature intended to limit the extent of the obligation, could not reaſonably have the effect of increaſing it. When the condition had not been performed, ſo that the penalty attached as a legal debt, courts of equity, in ſome caſes, interpoſed, to prevent ſuch penalty being carried further than what was conſidered to be its ſubſtantial intent, the ſecurity of the actual damages ſuſtained by the non-performance of a primary agreement, but the interpoſition for that purpoſe was neceſſarily at the inſtance of the obligor; and if the obligor, inſtead

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of reſorting to ſuch interpoſition, ſubmitted to the payment of the ſum awarded by the judgment as upon an unconditional debt, no further remedy could have afterwards been obtained upon the footing of the penal obligation. When the legiſlature, by the ſtatute of *William*, introduced the ſame principle in the proceedings at law, which had previouſly been the foundation of a practice in courts of equity, it certainly was not intended to extend the limits of the former legal obligation; the purpoſe was merely to confine the operation of it to what was regarded as its actual object; and when that object had exhauſted the debt which conſtituted the formal ſubject of the obligation, there was nothing further to which the proviſions of the legiſlature could be applied. Execution was to be only taken out for the damages awarded, but the judgment was to remain as a ſecurity for further breaches; a judgment wholly ſatisfied could not be a ſecurity for any thing; and a judgment partially ſatisfied muſt, upon the ſame principles, only be a ſecurity to the extent in which it was not ſatisfied.

The caſes in which it is held, that after ſeveral payments of an annual or other periodical ſum, ſecured by a penalty, execution may be had for the entire penalty, without regard to ſuch previous payments, ſtand upon a very different footing from thoſe which relate to the queſtion of a penalty remaining as a ſecurity for further payments, accruing *after the offer of an entire payment* of the penalty ſtipulated; for, in the former caſe, the payments are not made as a partial ſatisfaction of the debt compoſing the penalty, but as a performance of the condition, upon the failure of which alone the penal obligation is to attach.

The allowing a party to have ſatisfaction to the extent not only of the debt which conſtitutes the penalty, but alſo of the intereſt on that penalty, which is the proper damages for *its* detention, appears to be no more than anſwering the claims of ordinary juſtice, when the non-performance of the condition is attended with circumſtances that render the penalty, without ſuch intereſt, an imperfect ſatisfaction of the primary object of the contract; and it certainly ought to be the aim of every tribunal to render as perfect juſtice as is conſiſtent with the rules of law. By the rules of law, real damages may be allowed for the detention of a debt. For that, the caſe of *Holdipp* and *Otway* is a deciſive authority. By the forms of law, *1s.* damages is always awarded for the detention of the penalty, or any other debt; and theſe forms will be beſt rendered ſubſervient to their ſubſtantial purpoſes, by their being extended ſo far as may be neceſſary for ſecuring the original obligation, provided they are not extended further than is conſiſtent with their own particular character. And this is particularly the caſe with reſpect

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to bonds for ſecuring money, when the principal and intereſt amount to more than the formal penalty; whilſt the Courts reſtrain the legal operation of the formal inſtrument, in order that it may not be carried beyond the ſubſtantial purpoſe on the one hand, it is very unequal juſtice not to allow the full extent of that operation, when it is neceſſary to enforce ſuch purpoſe on the other. And it is the more extraordinary, that courts of equity, which in other caſes ſo far ſacrifice the form to the ſubſtance of the tranſaction, as to enforce the ſpecific performance of an agreement, only evidenced by its being the condition of a penal obligation, without allowing the payment of the penalty to be ſubſtituted for the performance of the agreement, ſhould ſo completely deviate from that practice in the very inſtance of all others where the real purpoſe of the agreement is moſt indiſputably evident, and where the meaſure of juſtice is with moſt facility aſcertained (*a*). But ſo are the precedents; and it is eaſier to follow precedents than to inveſtigate principles, and there is often a timidity in deviating from even thoſe precedents which are moſt at variance with principles, and that, when the effects of the deviation would be merely proſpective; and none of thoſe miſchiefs would ariſe which are the conſequences of diſturbing precedents that have been reſted upon as rules of property, and have ſo interwoven themſelves with the frame and ſubſtance of the law, that they cannot be ſeparated without occaſioning an injury diſproportionate to the advantage.

There is a ſtrong caſe, illuſtrative of one of the principles laid down by *Pothier*, that the penalty ſhall be deemed a full ſatisfaction, and which perhaps carries that principle beyond its fair extent. A ſervant entered into a bond for the due performance of his ſervice, and the maſter having recovered upon the bond, and received the money, it was held that he could not maintain an action againſt a third perſon, by whom the ſervant was ſeduced, though the money was not paid till after the other action was commenced. It was ſaid that a penalty, in the very term, includes more than the real damages actually ſuffered, and that the maſter having received more than ample ſatisfaction for the injury done him, he could not afterwards proceed againſt any other perſon for a further ſatisfaction. *Bird* v. *Randall*, 3 *Burr.* 1345. The modern determinations, that the penalty is only to be conſidered as a ſecurity, may perhaps induce the conſequence, that the rule eſtabliſhed in that caſe cannot be applied.

(*a*) I am here only contending for that incomplete juſtice which is ſatisfied with the payment of ſimple intereſt, but the creditor can only be placed in the ſituation which he would have been in if the primary agreement had been performed by the payment of compound intereſt; and probably he may have in the mean time been accumulating a load of compound intereſt upon the ſums which he has been obliged to borrow, in lieu of thoſe which he was intitled to receive.

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Much of the reaſoning in the caſe itſelf appears very diſputable, and ſome of the poſitions which it contains are clearly untenable. It does not, in point of reaſon, ſeem to be, by any means, a neceſſary conſequence, that one man ſhall not be charged with what he has agreed to pay upon the non-performance of his contract, and another charged with damages for the injury which he has committed, in cauſing that contract to be violated.

In the caſe of the Duke of *St. Alban's* againſt *Shore*, 1 *H. Bl.* 270. it appeared, that the plaintiff had entered into articles of agreement with the defendant for the ſale of an eſtate, upon which all trees were to be valued and paid for by the purchaſer, according to the valuation; and the parties mutually entered into penalties for the performance of their agreement. In an action to recover the penalty, on account of the defendant refuſing to complete his purchaſe, it was pleaded, that the plaintiff had cut down ſome trees, and thereby diſabled himſelf from performing his part of the contract; and a principal part of the diſcuſſion turned upon the nature of the agreement, and upon the queſtion, whether this was not ſuch a reciprocal agreement, that any non-performance on the one ſide would excuſe a non-performance on the other? But the point decided was, that as this was not an action of covenant where one party had performed his part, but was brought for a penalty, on the other party refuſing to execute a contract, and that, to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally, to complete his part.

It is to be obſerved, that this opinion was pronounced without adducing any reaſon, or citing any authority, that the point was firſt ſtarted by the Court, without having been agitated at the bar, ſo as to enable the plaintiff's counſel to agitate its juſtice or propriety. In order to form an opinion upon the rectitude of the deciſion, it muſt be aſſumed, that the plaintiff's breach of the agreement was not ſuch as to liberate the defendant; but only ſuch as to entitle the defendant to a compenſation in damages; for the Court thought themſelves relieved from giving a judicial opinion upon that part of the caſe. At common law, certainly it was no objection to a perſon ſuing for a debt due to him, that a ſimilar debt was due from him. The ſtatutes of ſet-off have introduced a particular ſyſtem upon that ſubject; but this caſe was not at all put upon the footing of a ſet-off. Previous to the ſtatute of *William*, the courts of equity had reſtrained actions for penalties on the non-performance of covenants to a mere ſecurity for damages actually ſuſtained; and by that ſtatute, the ſame principle is introduced into courts of law; ſo that the effect of the deciſion is, that notwithſtanding a party having, to a certain extent, violated his part of the

the agreement, and being ſubject to damages for ſuch violation, is intitled to an action to the full extent of the damages ſuſtained by the non-performance of the oppoſite party, and notwithſtanding an action, which in point of form is for the recovery of the penalty, is in ſubſtance only a remedy for the actual damages, he ſhall be deprived of that particular remedy, for the ſlighteſt poſſible violation of his own part of the agreement. I forbear entering into a further diſcuſſion, how far that propoſition is founded on correct and accurate principles, but have thought it proper to ſtate the propoſition according to what appears to be its neceſſary import and effect; by doing ſo, the ſpeculative inquirer will be enabled to form an opinion for himſelf, as to the foundation upon which it is eſtabliſhed; but I am far from thinking, that any reaſoning upon its principle will, in practice, be allowed to diminiſh its authority.

There is a caſe contraſted to that of a penalty, in which a creditor agrees, upon a certain condition being performed, to remit an advantage to which he is otherwiſe entitled; in this caſe, the condition muſt be literally performed: thus, where a bond was entered into, with a condition to pay a ſum in groſs on a given day, and a ſubſequent agreement made in favour of the debtor, eaſing him of that ſtipulated payment at that fixed day, and conſenting to take it by inſtalments, provided that he paid it punctually at the days agreed upon, otherwiſe the agreement and defeazance were to be void, Lord *Manſfield* ſaid: as the debtor has not paid the money punctually, they are void, and the groſs ſum is due. There is a diſtinction in the court of Chancery, that if 5 *per cent.* be reſerved for intereſt, with a condition to accept, if punctually paid, this condition muſt be ſtrictly performed, and the debtor ſhall not have relief after the day of payment is elapſed (becauſe the abatement was to be upon a condition which is not performed); but if 4 *per cent.* is reſerved, with an agreement, that if the four be not punctually paid at the day, the debtor ſhall pay five, that ſhall be conſidered as a penalty added, and the court of equity will, in ſuch caſe, relieve againſt it. Now, the preſent caſe is in effect within the former part of this diſtinction; for it is a condition unperformed, therefore, the debtor cannot have relief in a court of equity, any more than he can have it in a court of law; but the creditor has a right to have recourſe to his bond. *Bonafous* v. *Rybot*, 3 *Burr.* 1370.

NUMBER

NUMBER XIII.

(Referred to, Vol. I. p. 408.)

Of Compenſation, or ſet-off.

It is evidently a principle of natural reaſon and juſtice, that when two parties are mutually indebted, the balance only ſhall be paid; and that one of the parties ſhall not be compellable to pay the debt which he has incurred, and be left to ſue for that to which he is entitled. This principle forms an eſſential part of the civil law: and the effect of ſuch mutual debts, in deſtroying each other, is diſtinguiſhed by the term Compenſation; the extinction or reduction of the one debt enſues immediately, and by operation of law upon the other, being contracted; as is ſhewn in the Chapter to which this Appendix refers.

By the common law of *England*, if the plaintiff was indebted to the defendant in as much or more than the defendant was indebted to him, it was no defence. Until the reign of Queen *Anne*, if a perſon who owed me 1000*l.* became a bankrupt, and I was indebted to him in 50*l.* I muſt have paid the 50*l.* and have been left to my chance of any dividend upon my larger demand; or reverſing the account, I muſt have paid the 1000*l.* entire, and have taken my chance of the dividend upon the 50*l.* If my debtor in the larger ſum died, I muſt ſtill have paid the debt due from myſelf, poſſibly for the ſatisfaction of his ſpecialty creditors, and might entirely loſe the whole of my croſs demand. "The natural good ſenſe of mankind was firſt ſhocked at this in the caſe of bankrupts, and it was provided for by 4 *Anne*, *c.* 17. § 11. and 5 *G.* 2. *ch.* 30. § 28. Where there was no bankruptcy, the injuſtice of not ſetting off (eſpecially after the death of either party) was ſo glaring, that Parliament interpoſed, by the acts of the 2 and 8 of *Geo.* 2. and in any actions where there are mutual debts, the defendant may *ſet off* the debt due to himſelf, againſt that for which he is ſued. Before the ſtatutes which have been mentioned, where the nature of the employment, tranſaction or dealings, neceſſarily conſtituted an account, conſiſting of receipts and payments, debts and credits, the balance only was conſidered as the debt, and could only be recovered." *Vid. Green* v. *Farmer*, 4 *Burr.* 2214.

The doctrine which was thus introduced into the law of *England*, partakes very much of the nature of *compenſation* in civil law; but there is this material difference, that the debts are not in themſelves and of right balanced and extinguiſhed; that the right of *ſet-off* is merely a defence to an action for the debt; that a defendant is not obliged

obliged, in any inſtance, to avail himſelf of this right, but may at his option pay, or on other grounds conteſt, the one debt, and bring a ſeparate action for the other. If the creditor, to whom the larger debt is due, brings an action in which the other does not ſet off his mutual demand, but brings a counter-action, the debt due to the firſt may be ſet off in the action by the laſt, and is not extinguiſhed by his firſt obtaining a verdict for his whole debt; and he may take advantage of it in the action againſt him, remitting ſo much of what he has recovered, as will reduce it to the balance. *Baſkervilke* v. *Brown, et e contra*, 2 *Bur.* 1229.

The principle that the debt is not extinguiſhed by the right of ſet-off, is ſtrongly illuſtrated by the caſe of *Pitts* v. *Carpenter*, 1. *Wilſ.* 19, in which it was held that the plaintiff, to whom a larger debt than 40*s.* was originally due, but whoſe demand was reduced by ſet-off to leſs than that ſum, might bring his action in a ſuperior court, and was not within the proviſions of a local act, confining debts for leſs than 40*s.* to an inferior juriſdiction.

In the law of *England*, as in the civil law, the right of compenſation or ſet-off, is confined to debts; one injury cannot be balanced againſt another, nor an injury againſt a debt. *Freeman* v. *Hyett*, 1 *Bl. Rep.* 394. Neither can unliquidated damages, for not performing an agreement, be ſet off, either againſt another demand of a ſimilar nature, or a debt. *Howlett* v. *Strickland*, *Cowp.* 56. *Weigall* v. *Waters*, 6 *T. R.* 488. or, *vice verſâ*, a debt againſt theſe. *Bull. N. P.* 181. And this rule applies even when there is a bond with a penalty, which in point of form conſtitutes a debt, but the payment of which as ſuch cannot be effectively enforced. *Redriff* v. *Hogan*, *Bull. N. P.* 180. It may be added, that upon a bond for the payment of money, the money ſecured, and not the penalty of the bond, is for the purpoſes of ſet-off conſidered as the debt. 8 *G.* 2. ch. 24. And by ſetting off any money due under ſuch a bond (as the arrears of an annuity), the bond is not extinguiſhed. But certain ſtipulated damages which are preciſely due according to the terms of a contract, or a penalty to which the defendant has become abſolutely entitled, may be ſet off, theſe being certain liquidated debts. *Fletcher* v. *Dyke*, 2 *T. R.* 32. It was ruled, in *Eland* v. *Karr*, 1 *Eaſt*, 375, that it was no anſwer to a plea of ſet-off, that the defendant promiſed to pay the plaintiff in ready money.

The mutual debts muſt be due in the ſame right, and therefore a perſon cannot ſet off a demand in his own right againſt one, for which he is ſued as executor, or the reverſe, *Stat.* 22 G. 2. c. 22. *ſ.* 13. When a perſon continues tenant, or receiver to executors, after a teſtator's death, he cannot ſet off againſt debts contracted by him in that capacity, debts due from the teſtator in his life-

time. *Shipman* v. *Thomſon*, *Bull. N. P.* 180. *Tegetmyer* v. *Lumley*, *Willes*, 261. *Montague on Set-Off*, 32. Alſo if a debt is due to, or from ſeveral perſons jointly, there can be no ſet-off on account of the debt of either of them ſingly; and a debt to or from a man in his own right cannot be ſet off, againſt a debt in right of his wife. To this principle, and alſo to the public nature of the truſt repoſed in the aſſignees of a bankrupt, may be referred the deciſion that ſuch an aſſignee cannot retain a dividend due to one of the creditors, by ſetting off a debt from the creditor to himſelf. *Brown* v. *Bullen*, *Doug.* 407.

But where two perſons are indebted *jointly and ſeverally*, that engagement as being ſeveral may be ſet off againſt the debt claimed by either of them individually. *Fletcher* v. *Dyke*, 2 *T. R.* 32. Alſo, a debt from or to a ſurviving partner, may be ſet off againſt that for which he ſues or is ſued, on his own account. *Slipper* v. *Stidſtone*, 5 *T. R.* 493. *French* v. *Andrade*, 6 *T. R.* 582.

It is a propoſition confirmed by all the preceding caſes, that a debt cannot in general be ſet off, unleſs a counter action could be maintained between the ſame perſons, and in the ſame characters. But there may be ſome exceptions to the literal application of this rule. For inſtance, *Bottomly* ſued *Brook* on a bond. It was held to be a good cauſe of ſet-off, that the bond was given to *Bottomly*, as a truſtee for *Chancellor*, and that *Chancellor* was indebted to the defendant. *Vid.* 1 *T. R.* 619.

A debt may be aſſigned: and, though no action can be maintained for it in the name of the aſſignee, yet as ſuch aſſignments have for various purpoſes been recognized in courts of law, it may be reaſonably inferred, that after a perſon has aſſigned the debt due to him, and notified the aſſignment to the debtor, he cannot ſet off that demand againſt one which may be due from himſelf; on the other hand, it would be reaſonable to allow it to be ſet off, by the perſon to whom it was aſſigned; at leaſt, againſt any debt contracted after notice of the aſſignment (*a*); and that a debt due from ſuch perſon might be ſet off, againſt the action nominally brought by the original creditor; but I do not ſtate theſe diſtinctions as having any higher authority than mere ſuggeſtion.

A broker under a commiſſion *del credere*, who is anſwerable for debts and loſſes, may ſet off againſt a debt from himſelf, thoſe debts which are due to his principal, and for the amount of which he is perſonally liable, the tranſactions having paſſed wholly with himſelf, *Grove* v. *Dubois*, 1 *T. R.* 112. It has even been decided that

(*a*) As to the general principles reſpecting debts, ſo aſſigned, *Vid.* Appendix to P. I. Ch. 1. § 1. Art. 5. (No. IV.)

a broker

a broker with ſuch commiſſion, who has paid his entire debt to the aſſignees of a bankrupt, was entitled to receive it back. *Bize* v. *Dickaſon*, 1 *T. R.* 285. And it has been held that a factor who receives goods, and is authorized to ſell them in his own name, and makes the buyer debtor to himſelf, has a right to bring an action to compel payment: and it would be no defence to ſay, that as between the buyer and the principal, the buyer ought to have that money, becauſe the principal is indebted to him in more than that ſum; for the principal himſelf can never ſay that, but where the factor has nothing due to him. *Drinkwater* v. *Goodwin*, *Cowp.* 251. It ſeems a neceſſary deduction from theſe caſes, that if a factor ſells goods in his own name, and an action is brought by the principal, the buyer may ſet off any debt due to him from the factor; and ſo it has been decided, *George* v. *Claggett*, 7 *T. R.* 359.

Amongſt the other effects of compenſation in the civil law, as amounting in itſelf to a liquidation of the debt, a creditor is obliged to reſtore the pledge, upon contracting a debt to an equal amount, or upon contracting a debt to a ſmaller amount, and an offer of the balance. I conceive that the difference between compenſation and ſet-off, as eſtabliſhed by our modern ſtatutes, would in this reſpect be material; that our right of ſet-off is merely a matter of defence, and is not in any caſe the foundation of a claim. It is eſtabliſhed by ſeveral caſes, that there can be no ſet-off in the caſe of a diſtreſs for rent. *Vid.* the caſes cited, *Sapsford* v. *Fletcher*, 4 *T. R.* 511. Lord *Kenyon* there ſaid, "It was much to be lamented that it ſhould have been ſo decided, but for the ſake of certainty in the law, they muſt ſubmit to thoſe deciſions, till the legiſlature alter the law. The deciſion in the principal caſe was, that a ſubtenant, who, under threats of diſtreſs, had paid rent to the original leſſor, might defend himſelf to that extent againſt the diſtreſs of his own landlord, the original leſſee; for that it amounted not to a ſet-off, but a payment, which ſeems fully to ſupport the diſtinction ſuggeſted. Upon the ſame principle I am ſtrongly inclined to think, that intereſt is not ſtopped by contracting a debt, which does not carry intereſt; and that only the principal of ſuch a debt can be ſet off againſt the full claim for principal and intereſt. Before the ſtatutes of ſet-off, the queſtion could not have ariſen, and thoſe ſtatutes do not ſeem ſufficiently comprehenſive to produce the effect of extinguiſhing the debts to the extent of their concurrence.

If a debt, barred by the ſtatute of limitations, be pleaded as a ſet-off, the plaintiff may reply the ſtatute; if it be given in evidence on a notice of ſet-off, it may be objected to at the trial. *Bull. N. P.*

180; but perhaps, in moſt caſes, the ſubſiſtence of the mutual accounts would be held to take the caſe out of the ſtatute. *Vid. infra*, No. XV.

It is now ſettled, contrary to former opinions, that ſet-off can only be maintained for ſuch debts as were due at the commencement of the action. *Evans* v. *Proſſir*, 3 *T. R.* 186.

The courts of law exerciſe a ſummary juriſdiction, with regard to money due upon judgments, more extenſive than the right of ſet-off under the ſtatutes; the proviſions for ſet-off, under the bankrupt laws, are alſo more extenſive than the common right of ſet-off above mentioned; but a particular examination of thoſe ſubjects, or a view of the doctrines of pleadings, and practice reſpecting ſet-off, does not fall within the ſcope of the preſent deſign.

The principles, and caſes relative to the law of ſet-off, are collected in a publication by Mr. *Montague*, which has appeared ſince the preceding ſummary was compoſed.

NUMBER XIV.

Of Confuſion or Extinguiſhment.

(Referred to, Vol. I. p. 429.)

Moſt of the obſervations in the chapter of *Pothier*, to which this number refers, are principally applicable to the caſe of an heir, who, according to the rules of the civil law, was a complete repreſentative of the deceaſed, both in reſpect of his rights and obligations, without reference to the adequacy of the property, whoſe ſituation was therefore materially different from that of the heir, or the executor of the *Engliſh* law.

Much of what is ſtated upon the ſubject of confuſion, is only an amplification of the ſelf-evident principle, that no man can be under an obligation to himſelf. With us where a debtor or creditor is made executor, it is plain that an action cannot be ſuſtained, in reſpect of that character, by the ordinary proceſs of the law; but ſo far as the rights, or obligations of third perſons are involved, the courts of equity will provide that there ſhall not be any defect of ſubſtantial juſtice, by the union of two characters in the ſame perſon; but the reſpective characters, ſo far as is neceſſary for this purpoſe, will be conſidered as no leſs diſtinct, than if they had reſided in different perſons.

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One of the moſt familiar inſtances of confuſion taking place, according to the *Engliſh* law, is the marriage of the debtor and creditor, by which, as a general rule, the reſpective rights and obligations become abſolutely extinct, and do not revive upon the death of either of the parties. The civil law admitting a ſeparation of property between huſband and wife, the ſame conſequence did not enſue. In the *Engliſh* law there is an excepted caſe, where a huſband gives a bond to his intended wife for a proviſion, to take place after his death. *Vid. Cage* v. *Acton*, 1 Lord *Raym.* 515. *Milbourn* v. *Ewart*, 5 *T. R.* 381. And in equity, any agreement between the parties, in reference to their intended marriage, will be enforced; notwithſtanding the failure of the legal remedy.

With reſpect to executors, the effect of extinguiſhment is very fully diſcuſſed, in the caſe of *Wankford* v. *Wankford*, 1 *Salk.* 229, and it is deduced as a ſettled rule from preceding authorities, that if ſeveral perſons are bound jointly and ſeverally, and the obligee makes one of them his executor, it is a releaſe of the debt; and the executor cannot ſue the other obligor. So, if the obligee makes the obligor and another executors, although the obligor never adminiſters, yet the action is gone for ever; and although the obligor dies, and makes an executor, the other co-executor of the firſt teſtator who ſurvives ſhall not have an action againſt the executor of the obligor. But if the executor of the obligee takes the obligor to huſband, that is no extinguiſhment of the debt; becauſe the huſband may pay money to his wife as executor, and if ſhe lays the money ſo paid to her by itſelf, the adminiſtrator *de bonis non* of her teſtator (if ſhe dies inteſtate) ſhall have that money as well as any other goods of the teſtator.

If adminiſtration of the goods of the obligee is committed to the obligor, that is but a ſuſpenſion of the action, and not an extinguiſhment of the debt; the reaſon is, that the commiſſion of adminiſtration is not the act of the obligee. All the intereſt of the adminiſtrator is from the ordinary; but all an executor's intereſt is from the teſtator.

This extinguiſhment upon the appointment of an executor, is not wrought by way of actual releaſe; but is in the nature of a legacy, and like all other legacies muſt be poſtponed to debts from the teſtator: and therefore, though no action can ever be maintained for a debt, which is extinguiſhed by the debtor being appointed an executor, he is chargeable with it in account, as part of the aſſets of the teſtator, ſo far as the intereſt of creditors is concerned; and I apprehend there can be no doubt, but a ſuit in

equity may be maintained againſt a perſon whoſe obligation is diſcharged by the appointment of his co-obligor, as an executor (*a*).

That ſuch appointment ſhall even operate as a legacy is by no means clear; and at any rate it only amounts to a mere preſumption, liable to be repelled by inference from other parts of the will; as where a teſtator leaves a legacy, and directs it to be paid out of a debt due to him from the executor, ſuch debt ſhall be aſſets to pay, not merely that ſpecific legacy but all other legacies. 3 *Bac. Abr.* 11. *Yelv.* 160. (*b*) In like manner, if he leave the executor a legacy, it is held to be a ſufficient indication, that he did not mean to releaſe the debt, and in ſuch caſe the executor ſhall be truſtee for the reſiduary legatee, or next of kin. *Coney* v. *Goodinge*, 3 *Bro. Ch.* 110. So where a teſtator bequeathed large legacies, and alſo the reſidue of his eſtate to his executors, one of whom was indebted to him by bond in 3000*l.*, it was decided that this debt ſhould be added to the ſurplus, and that both executors were equally entitled to it. *Brown* v. *Selwin*, *Temp. Talb.* 240. *Toller* 274.

The caſe of *Coney* v. *Goodinge* may warrant a more extenſive inference than is drawn from it by Mr. *Toller*: for the Lord Chancellor did not, according to the report (which is very ſhort), found his deciſion principally upon the executor having a legacy; but declared generally, that he thought it a ſettled point in that court, that the appointment of the debtor executor, was no more than parting with the action. I do not find any expreſs deciſion in favour of ſuch extinguiſhment operating as a legacy, although it is taken for granted in very reſpectable text authorities (*c*).

There is a material difference between a debtor being appointed executor by his creditor, and a creditor being appointed executor by his debtor. In the firſt caſe, the debt is extinguiſhed, ſo that no action can be ever brought. In the ſecond, the executor may ſue the heir upon any debts for which the heir is legally bound, unleſs ſufficient aſſets come to him as executor; for although he is the perſon to receive, yet having no aſſets he is not the perſon who ought to pay; but if it appears that he has adminiſtered aſſets

(*a*) This is the opinion of *Powell*, *J.* though *Holt*, Ch. J. *contra*, ſays it does not amount to a legacy, but to a payment and releaſe; he, however, admits it to be aſſets.

(*b*) This caſe does not, however, warrant the propoſition.

(*c*) 2 *Bl. Com.* 512. *Harg. n. Co. Lit.* 264. In *Errington* v. *Evans*, *Dickens*, 456. Lord *Thurlow* ſaid, that where an obligee makes an obligor *one* of the executors, and takes no notice of the bond, but deviſes the reſidue of the eſtate to others, he was clear that it was not in equity an extinguiſhment of the debt, though at law it would be ſo, becauſe a perſonal demand once ſuſpended is not to be reſumed; and he decreed the executor to account accordingly.

to the amount of the debt or demand, it has been decided that it would be a good defence to the heir.

We have ſeen that the extinguiſhment takes place, in regard to a debtor appointed excutor though he never adminiſters; but a creditor who was appointed executor, having refuſed to act, was allowed to ſuſtain an action againſt the other executor; and Lord *Kenyon* ſaid, that the propoſition, that if A. owe B. a ſum of money, and chuſe to make him his executor, though he will not act, his legal remedy is extinguiſhed, was too monſtrous to admit of any argument. *Rawlinſon* v. *Shaw*, 3 *T. R.* 577.

In the caſe of *Goodright* v. *Wells*, *Doug.* 771, a perſon being ſeiſed of an eſtate as truſtee, by deſcent on the part of his mother, became entitled to the beneficial intereſt by deſcent on the part of his father, and the queſtion aroſe after his death, whether the paternal or the maternal heirs were entitled? The caſe was decided upon a point irrelevant to the preſent ſubject; but Lord *Manſfield*, and *Aſhhurſt*, and *Buller*, *J.* (*Willes*, *contra*) intimated their opinion in favour of the maternal heirs; for that the moment both the legal eſtate and the truſt meet in the ſame perſon, there is an end of the truſt which is merged and gone, for a man cannot be a truſtee for himſelf, and one ſet of heirs has no more equity than the other; there never was a caſe in which it was held, that when an eſtate came by deſcent, the heir was a truſtee though the anceſtor was not.

Where a perſon poſſeſſed of an eſtate becomes in a different right entitled to a charge upon the eſtate, the charge is in general merged in the eſtate, and does not revive in favour of the perſonal repreſentatives againſt the heir; there are particular exceptions, as where the perſon in whom the intereſts unite is a minor, and can therefore diſpoſe of the perſonalty and not of the eſtate; but in the caſe of a lunatic, the merger and confuſion was ruled to have taken place. Lord *Compton* v. *Oxenden*, 2 *Veſ. Jun.* 261. Lord *Loughborough* ſaid, that it is a clear principle, both at law and in equity, that where there is a confuſion of rights, where debtor and creditor become the ſame perſon, there can be no right put into exertion, but there is an immediate merger; but it is true in equity, though there may be that which, if all was reduced to a legal right, would of neceſſity operate as a merger, the court acting upon the truſt will on the intent expreſs or implied preſerve them diſtinct, and that confuſion of rights will not take place.

NUMBER. XV.

(Referred to, Vol. I. p. 457.)

Of the Statutes of Limitations, and of Presumptions founded upon Length of Time.

In ſtating the *Engliſh* law reſpecting limitations, and preſumptions founded upon length of time, I ſhall 1ſt advert to the proviſion reſpecting ordinary debts; 2d, (deviating from my uſual plan which does not embrace the law of real eſtates) to the caſe of ejectments; and 3d, to thoſe caſes in which, without any legiſlative proviſion, the Courts of Juſtice have adopted rules, analogous to thoſe conſtituted by ſtatute; without dwelling upon actions for injuries, or proviſions of a ſpecial and particular nature.

By ſtatute 21 *Jac.* 1. Ch. 16. § 3. all actions of account, and upon the caſe, other than ſuch accounts as concern the trade of merchandize, between merchant and merchant, their factors or ſervants, all actions of debt grounded on any lending, or contract without ſpecialty, and all actions of debt for arrearages of rent, ſhall be commenced within ſix years after the cauſe of action.

By the ſame ſection, actions of treſpaſs, *detinue* and *replevin*, muſt be commenced within ſix years; actions of aſſault, battery, wounding, and impriſonment, within four years; and actions of ſlander, within two years.

By § 4. if judgment is given for the plaintiff, and afterwards reverſed by a writ of error, or arreſted; or if the defendant is outlawed, and the outlawry reverſed, a new action may, from time to time, be commenced within a year afterwards.

And by § 7. if any perſon entitled to any ſuch cauſe of treſpaſs, *detinue*, action for trover, replevin, actions of accounts, actions of debts, actions of treſpaſs for aſſault, menace, battery, wounding, or impriſonment, actions upon the caſe for words, at the time of the cauſe of action accruing, ſhall be under the age of twenty-one years, *feme covert*, *non compos mentis*, impriſoned, or beyond ſeas, ſuch perſons ſhall be at liberty to bring the actions within the time before limited, after being of full age, diſcovert, of ſane memory, at large, and returned from beyond ſeas, as other perſons not having the ſame impediments ſhould have done.

And by 4 & 5 *Ann.* c. 16. where any perſons, *againſt whom* there is cauſe of action, ſhall be beyond ſea at the time of ſuch cauſe of action accruing, the perſons who ſhall have ſuch cauſe of action, ſhall have liberty to bring an action within ſuch times as are limited by the ſtatute of *James*, after their return.

I. The principle ſtated by *Pothier*, that preſcription cannot begin to run, but from the time when the creditor might inſtitute his

demand, is included in the very terms of the ſtatute, ſo that if credit is given, or if a debt is contracted upon condition, it is manifeſt that no cauſe of action can ariſe until the credit is expired, or the condition performed, and conſequently that before thoſe periods the time of limitation cannot commence. When the defendant received money belonging to an inteſtate's eſtate, it was held that the limitation only commenced from the time of adminiſtration being granted; for until that time there was no perſon entitled to receive the money. *Cary* v. *Stevenſon*, 2 *Salk.* 421. See *Witterſheim* v. The Counteſs of *Carliſle*, 1 *H. Bl.* 601.

I am not aware of any caſe in which the ſubject of a contract, including ſeveral diſtinct times of payment, has fallen under conſideration. To ſuch a caſe the terms of the ſtatute may be literally applied, ſo as to run for each portion from the reſpective times of payment; and I ſee no ground upon which the operation of it can be prevented, though, under theſe circumſtances, the courts would in all probability be peculiarly diſpoſed to favour every implication of an acknowledgment, extended to the time appointed for the lateſt payment.

Where there are mutual accounts between the parties, an acknowledgment will be implied at the time of the laſt tranſaction; this will be more particularly mentioned preſently. But the particular exception in the ſtatute of accounts, between merchant and merchant, ſeems to have a more extenſive effect; for it has been held that to ſuch caſes the ſtatute does not at all attach, and therefore where the cauſe of action is brought within that exception, no length of time can be alleged as a bar to the demand. *Catling* v. *Skoulding*, 6 *T. R.* 191 (*a*). This exception is clearly confined to the caſe of mutual accounts and reciprocal demands between two perſons in trade, and does not extend to caſes between a tradeſman and his cuſtomers, for theſeare not merchants' accounts. *Bul. N. P.* 149.

The continuance of a mutual account of debts and credits is held ſufficient evidence of an acknowledgment: for, where an action was brought for ſeveral years' rent, and the tenant had ſupplied his landlord with ſhop-goods during the latter period of the tenancy, it was held that the ſtatute did not apply. Lord *Kenyon* ſaid, "Here are mutual items of account, and I take it to be clearly ſettled as long as I have any memory, that every new item and credit in account, given by one party to the other, is an admiſſion of there being ſome unſettled account between them, the amount of which is afterwards to be aſcertained; and any act which the jury may conſider as an acknowledgment of its being

(*a*) *Vide* in ſeveral caſes cited, *Williams*'s notes to p. 2. *Saund.* 127.

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an open account, is ſufficient to take the caſe out of the ſtatute. Where all the articles are on one ſide, it ſeems, according to a caſe cited by his Lordſhip, and decided by Mr. Juſtice *Denniſon*, that the laſt item, which happens to be within ſix years, ſhall not draw after it thoſe that are of longer ſtanding. *Catling* v. *Skoulding*, *Ub. Sup.*

In the exceptive clauſe of perſons under certain protections, moſt of the cauſes of action before enumerated are repeated; but the clauſe does not mention actions on the caſe generally, but only actions on the caſe for words. It has however been decided to have a general application, and to include the common action upon promiſes, for recovery of debts; actions of debt are included in the enumeration; and though there is a caſual omiſſion of expreſſion in the excepting clauſe, it is impoſſible to ſuppoſe that this exception was intended to apply only partially in reſpect of the objects mentioned in the general purview. *Vide Rochtſchilt* v. *Leibman*, 2 *Str.* 836.

Upon the effect of the exception as to perſons beyond ſeas, it has been obſerved by the Court of Common Pleas, that if the plaintiff is a foreigner, and doth not come to *England* in fifty years, he has ſtill ſix years after his coming to *England* to bring his action; and if he never comes to *England* himſelf, he has always a right of action whilſt he lives abroad, and ſo have his executors or adminiſtrators after his death. An infant may ſue before he comes of age, if he pleaſes; but if he does not, he has ſix years after he comes of age, to bring his action. While any of the diſabilities mentioned in the ſtatute of limitations continue, the party may, but is not obliged, to bring his action. *Stathorſt* v. *Græme*, 3 *Wilſ.* 145. It has been alſo decided, that if ſome of the perſons, having a joint cauſe of action, are in the kingdom, and others beyond ſeas, the ſtatute attaches as if they had all been in the kingdom. *Perry* v. *Jackſon*, 4 *T. R.* 516. The term *beyond ſeas* is ſtrictly conſtrued, and the exception is not allowed to extend to a perſon in *Scotland*. *King* v. *Walker*, 1 *Bl. Rep.* 286.

In caſe ſix years have not elapſed at the time of the creditor's death, the executor is allowed to commence an action after the expiration of ſix years, provided he does ſo within one year after the death of his teſtator. This is ſaid to be by the equity of the clauſe which gives a year to commence a new action, in caſe the firſt judgmen thasbeen arreſted or reverſed. *Bul. N. P.* 150. *Wilcock* v. *Huggins*, 2 *Str.* 907. However reaſonable it may be to allow ſuch an exception, it is not very obvious how any inference to that effect can be drawn from the clauſe to which it is referred.

It

It is a rule fully eſtabliſhed, that when the time required by any ſtatute of limitations has begun to run, it ſhall continue, notwithſtanding the party entitled afterwards falls under any of the protections, or, as they are uſually called, diſabilities; for inſtance, if a woman marries the day ſhe comes of age, or a perſon is thrown into priſon the day after his arrival in the kingdom, the time will run, without interruption, from the time of coming of age, or of the arrival. If it has commenced againſt the anceſtor, it will continue againſt his infant heirs. A diſtinction was lately endeavoured to be taken between a voluntary diſability, ſuch as marriage, and one which was involuntary, ſuch as impriſonment; but this was not allowed. *Doe* v. *Jones*, 4 *T. R.* 300. *Smith* v. *Hill.* 1 *Wilſ.* 134.

According to the modern determinations of *Engliſh* courts, the admiſſion of a debt has a more extenſive effect than that which is ſtated by *Pothier;* for it is now an eſtabliſhed rule, the application of which is of daily experience, that the ſlighteſt acknowledgment of the obligation not having been diſcharged, is ſufficient not only to interrupt the operation of the ſtatute, but to revive from that time the right of action, which was extinct.

Caſes have occurred, in which a perſon, by mentioning in converſation that he had contracted a debt, but ſhould not pay it, as it was of above ſix years ſtanding, or by declaring at the time of his being ſerved with proceſs, that he ſhould on that account reſiſt the payment, has deprived himſelf of that right, upon which it was his intention to inſiſt.

What acts or declarations conſtitute an acknowledgment, is a queſtion of fact; it was therefore ruled, that a judge ought to have ſubmitted the effect of a letter, couched in terms of ambiguity and evaſion, to the deciſion of a jury, inſtead of deciding upon the inſufficiency of it, of his own authority. *Lloyd* v. *Maund*, 2 *T. R.* 760.

A diſtinction prevails between ſuch an act as ſhall prevent the operation of the ſtatute of limitations, and ſuch as ſhall repel the defence of an obligation being contracted during minority. In the firſt caſe, a mere admiſſion that the debt remains undiſcharged is ſufficient; in the ſecond, there muſt be an actual promiſe. And the diſtinction is not without foundation; for, in the firſt caſe, the obligation is founded upon the fact, the length of time operates as a defeazance, and the admiſſion furniſhes evidence, that the preſumption, which was the cauſe of providing a bar, is contrary to the fact. In the other caſe, there is no legal obligation in the firſt inſtance; there is only a moral obligation, which may be a ſufficient conſideration to ſupport an actual promiſe. The mere acknowledgment

ledgment of such moral obligation can have no legal effect; an actual intention to assume a personal responsibility is the only foundation of a legal demand, and that intention must be manifested by acts or declarations inconsistent with the contrary disposition.

The effect of the statute is confined to a right of action, it is not to collateral purposes regarded as an extinction of the debt; therefore, if a person by will directs his debts to be paid, those which were barred by the statute are held to be included.

Neither is a creditor, whose debt is barred by the statute, precluded from taking out a commission of bankrupt, at least, unless the objection is taken by the bankrupt himself. *Quantock* v. *England*, 5 *Bur.* and even in that case, I have known the argument, in support of the opposite proposition, disallowed (*a*). And it is clearly no objection to the proof of a debt, under a commission, that it was contracted above six years before the commission issued.

A partial payment by one of the drawers of a joint and several promissory note, was held to be a sufficient acknowledgment, to prevent the operation of the statute in favour of the others. *Whitcomb* v. *Whiting*, *Doug.* 652. And I conceive it may be stated generally, that an acknowledgment, in whatever manner by one of several joint debtors, shall be obligatory upon all, and that the distinction between such acknowledgment being made within, or after the period of limitation, would not be allowed.

It has been decided, that where one joint debtor became a bankrupt, the payment of a dividend by his assignees should operate as an acknowledgment to affect the other. *Jackson* v. *Fairbank*. 2 *H. Bl.* 340. This was certainly carrying the matter to the furthest possible extent; for the right to prove upon the estate was not affected by the statute of limitations, and could not have been resisted by the assignees.

By the several decisions which have taken place, the effect of the statute of limitations seems to be almost reduced to a mere matter of presumptive evidence. However conformable such a course of proceeding may be to the original principles, which render it expedient to fix a limitation of time, it might be justly questioned, whether any thing less than an acknowledgment, intended to import the subsistence of a valid obligation, should be allowed to satisfy the true construction of the statute (*b*).

It

(*a*) Upon applying for the rule to shew cause why there should not be a new trial in the case of *Gleister* v. *Hewes*, reported on another point, 7 *T. R.* 498.

(*b*) It is several years since these observations have been committed to writing. By a very recent decision, it was established, that saying, *I do not consider myself as owing Mr. B. a farthing; it being more than six years since I contracted; I had the goods, and paid part,* and

It may not be improper here to hint, that conſiderable caution ſhould be applied to the evidence of perſons brought to prove a mere verbal acknowledgment. Thoſe perſons are often ſelected to apply to the party charged as debtor, on account of their cunning in catching at any ambiguous expreſſion, and in repreſenting the caſe moſt favourably for thoſe by whom they are employed. To this it may be added, that ſuch evidence is ſeldom expoſed to the temporal riſks which attend the commiſſion of perjury (*a*). It has been argued, that where a party has been induced, by fraud, to pay money, the ſtatute of limitations does not run, or at leaſt only runs from the time when the fraud is diſcovered; but the allegations in the particular caſe were deemed not ſufficient to raiſe the queſtion. *Bree* v. *Holbeach*, *Doug.* 655. I can, however, hardly think that the argument is tenable. Courts of equity have, in the exerciſe of that diſcretionary power which they are allowed to poſſeſs, adopted an analogy to the ſtatute of limitations, with an

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and 26*l. remains due*, was an acknowledgment which took the debt out of the ſtatute. The Court ſaid, that whatever their opinion upon the ſtatute might have been, had the queſtion been new, yet after the long train of deciſions upon the ſubject, it was neceſſary to abide by the conſtructions which had been put upon it; in conformity with which they thought themſelves bound to hold that what was ſaid by the defendant was ſufficient acknowledgment of the pre-exiſting debt, to create an aſſumpſit, ſo as to take the caſe out of the ſtatute. *Bryan* v. *Horſeman*, 4 *Eaſt*, 599. This deciſion was certainly in conformity with the ſeries of precedents upon the ſubject; but as to the general precedent of adhering to the mere authority of former caſes, in oppoſition to the poſitive terms of an act of parliament, or an eſtabliſhed maxim of law, of placing a ſecondary above a primary authority, much doubt may fairly, and without diſreſpect, be entertained. Where the return to the ancient principle would be attended with material detriment, as by diſturbing titles to real eſtates, held under the ſanction of rules, which, however erroneous in themſelves, have been eſtabliſhed by a ſeries of precedents, the reaſon for an adherence to the precedents evidently preponderates; but where there will be no inconvenience beyond the immediate caſe, where the general conſequences will be wholly proſpective, I cannot but adhere to the opinion (which I have perhaps expreſſed with obtruſive repetition), that the courts of juſtice have as much authority now to reſtore the law, as they have had before to ſubvert it; and that a correct principle of law is an authority entitled to higher reſpect, than an erroneous ſet of precedents. Conſidering the law, however, upon the particular ſubject, as now beyond the reach of argument, and aware how much my own opinion upon the effect of precedent is different from that which uſually prevails in practice, I think it not irrelevant to ſuggeſt to perſons whoſe claims are barred by the ſtatute, and who wiſh to obtain an acknowledgment of the ſubſiſtence of the debt, the utility of filing a bill of diſcovery, obliging the defendant to ſtate whether the debt was contracted, and whether it has been paid. If the ſubſiſtence of the debt is admitted, and without perjury, it cannot be denied, it will not, if there is any conſiſtency of deciſion, be of any avail to add a claim to the protection of the ſtatute.

(*a*) Mr. Serjeant *Williams* obſerves to the ſame effect, that it might perhaps have been as well if the letter of the ſtatute had been ſtrictly adhered to; it is an extremely beneficial law, on which, as has been obſerved, 2 *Salk.* 421. *Green* v. *Revitt*, the ſecurity of all men depends, and is therefore to be favoured, and although it will now and then prevent a man from recovering an honeſt debt, yet it is his own fault that he poſtponed his action ſo long; beſides which, the permitting of evidence of promiſes, and acknowledgments within the ſix years, ſeems to be a dangerous inlet to perjury.

exception

exception in cases of fraud; and it seems from thence to be inferred, that the courts of law must adopt, in the construction of the statute, an exception analogous to that of the courts of equity. But the exposition of a statute is imperative, and not discretionary; and to qualify the express provisions of an act, by exceptions deduced from its supposed spirit, however conducive to the justice of particular cases, is a most alarming precedent. Besides, the ground of introducing a period of limitations is the lapse of memory, and the loss of evidence. A transaction, which when explained is perfectly fair, may be attended with circumstances of a fraudulent aspect, and it would be unjust to let those circumstances induce a claim, where the evidence, capable of affording an explanation, is lost. The qualification deduced from the time of discovering the fraud, would be attended with continual uncertainty; for circumstances may appear to give a man the first discovery of a fact, with which he has been long acquainted, but the knowledge of which rests in his own mind.

There is another rule in courts of equity, which may deserve a different consideration, as applied to legal demands, viz. that length of time is no bar in the case of a *trust*. Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right; for, until then, there is nothing adverse, and I conceive that upon principle, no action should be allowed in these cases, without a previous demand; consequently, that no limitation should be computed further back than such demand. And I think it probable, that under these circumstances, the limitation would not be allowed to attach, though the other part of the observation would be as probably disallowed; for a sweeping rule has been by some means introduced into practice, that an action is a demand, whereas every action in its nature supposes a preceding default: where money is improperly received, or goods are bought without any specific credit, or even where money is borrowed generally, there is held to be an immediate duty, and it is a perfectly legitimate conclusion, that no demand can be necessary, in addition to the duty itself. But wherever there is a loan, in the nature of a deposit, or any other confidential duty, is contracted, the mere creation of that duty unaccompanied with the absolute breach of it, by denial, or inconsistent conduct, ought not to be considered as a ground of action.

The commencement of an action within the six years, of course prevents the statute of limitations having effect. There are many cases upon the subject, the result of which is, that the actual day of commencing the action is the time to be considered, without regard

regard to thoſe fictitious relations, which, for general purpoſes, are deemed the commencement of the ſuit, and that the ſuit ſo commenced muſt be that which is effectively proceeded in.

II. By the ſame ſtatute of 21 *Jac.* 1. c. 16. no perſon ſhall make entry into any lands, but within twenty years after his right ſhall firſt deſcend, or accrue; but in caſe the perſons entitled ſhall be at the time of ſuch right firſt deſcended, or accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the ſeas, ſuch perſons, or their heirs, may make an entry as before the act, ſo as they take the benefit of the act within ten years after the diſability removed.—The right of entry is eſſential to the maintenance of an action of ejectment, which is now the almoſt invariable courſe of proceeding for the recovery of lands.

Writs of right may be ſued out within ſixty years, which is the longeſt period of limitation allowed by law, with the like exceptions as to infants, &c.

In caſe of a fine with proclamations, all perſons are barred after five years, from the levying of the fine, except perſons under diſability, and perſons whoſe right ſhall accrue after proclamation, who muſt proceed within five years after the diſability is removed, or the right accrues. 4 *Hen.* 7. *c.* 24.

By 9 *Geo.* 3. *c.* 16. the king (who is not bound by general acts of parliament) is precluded from claiming any lands, &c. except within ſixty years after the title accrued.

The effect of the ſtatute of limitations in reſpect to ejectments, is different from that which is applied to it in caſe of debts, whereby, as we have ſeen, it is reduced to little more than a mere preſumption. For a poſſeſſion of twenty years gives an actual poſſeſſory title, which may be made the ſubſtantive ground of a claim, without being ſubject to any defeazance, by evidence of an anterior and adverſe right. *Taylor* v. *Atkins*, 1 *Bur.* 119.

So, a poſſeſſion of ſixty years or of five years, after levying a fine, is not only a bar to any judicial proceeding, but a complete and ſubſtantive title, ſubject to the ſeveral exceptions which are introduced in favour of perſons under age, or having other protections or diſabilities.

In order to ſuſtain an ejectment, there muſt therefore have been an actual poſſeſſion, conſiſtent with the title claimed within twenty years; and acts which merely prove a property, but not a poſſeſſion, are inſufficient.

But the ſtatute of limitations can only operate in caſe of an adverſe poſſeſſion; therefore, if one perſon has held the eſtate on the joint account of himſelf and another, or by the permiſſion of the perſon really entitled, and without claiming any inconſiſtent right,

the

the original title is not affected. Whether the poſſeſſion of one perſon is adverſe to, or conſiſtent with the title of another, is, in every caſe, a queſtion of fact, to be collected by a jury, from all the circumſtances. See *Doe* v. *Proſſer*, *Cowp.* 217. *Page* v. *Selby*, *Bul. N. P.* 102.

The obſervation, that if the ſtatute has once begun to operate, it continues to run, notwithſtanding any ſubſequent diſability, has already been mentioned, and this rule has been more frequently applied to the caſe of titles than of contracts.

We have ſeen that, according to the civil law, a preſcription, which began againſt the heir, continued againſt the ſubſtitute. In the law of *England*, I take it to be clear, that the contrary is the caſe, and that no laches of the tenant for life, or in tail, can operate againſt thoſe who are entitled in remainder, unleſs the adverſe poſſeſſion was paramount to that of the perſon from whom the ſeveral claims are derived. Such indeed is the literal conſtruction of the act, and the application of it, in practice, is perfectly familiar.

But the laches of the tenant in tail falls upon his iſſue, claiming under the ſame limitation.

III. The utility of fixing a period of time, after which, rights that have not been aſſerted, or acknowledged, ſhall be conſidered as extinct, has induced the courts of juſtice, in many inſtances, to follow the example of the legiſlature, and to adopt a limitation of time, which ſhall be concluſive, for the bar of a claim, or the protection of a poſſeſſory enjoyment. And the period adopted for this purpoſe is almoſt invariably twenty years.

The preſent view of the ſubject does not extend to thoſe caſes in which the lapſe of time is merely conſidered as a matter of circumſtantial evidence; and as ſuch, is either alone, or in conjunction with other circumſtances, relied upon as material in reſpect of an individual caſe. The effect of it, in this point of view, may fairly vary, according to the different impreſſions of thoſe to whom the deciſion of queſtions of fact properly belongs, and is perfectly diſtinct from the application of a general rule of preſumption.

The ſtatute of limitations, as we have ſeen, only extends to actions of debt, founded upon any loan or contract, without ſpecialty. This, of courſe, excludes bonds and all debts ſecured by deed; but it is now an eſtabliſhed rule, that after a lapſe of twenty years, without payment of intereſt, or other acknowledgment, payment ſhall be preſumed. And though this is only a circumſtance for the jury to found a preſumption upon, as it is a preſumption univerſally applied, it is in a great meaſure attended with the ſame effect as an abſolute bar.

A ſmaller

A ſmaller period of time may, in conjunction with other circumſtances, ſuch as ſettling another account in the intermediate time, without taking notice of the particular demand, be ſufficient to induce a preſumption in the particular caſe; but any conſideration of that kind falls within the diſtinction above referred to. *Vide Oſwald* v. *Leigh*, 1 *T. R.* 270.

It is a general rule, that a perſon ſhall not be allowed to make evidence for himſelf; but it has been held, that an indorſement of the payment of intereſt upon a bond, made ten years before the preſumption attached, ought to be left to the jury to decide, whether it was made with the privity of the obligor; on the other hand, where the indorſement was made after the expiration of twenty years, the evidence was rejected as inadmiſſible, and the Chief Juſtice took the diſtinction (manifeſtly founded in reaſon and good ſenſe), that in the preceding caſe the indorſement was admitted, becauſe it appeared to have been made at a time when it could not have been thought neceſſary to encounter the preſumption. *Searle* v. Lord *Barrington*, 2 *Str.* 826. 2 Lord *Raym.* 1370. *Tamer* v. *Criſp*, 2 *Str.* 827.

Our courts of equity have, in moſt inſtances, adopted the preſumption of a demand having been ſatisfied, or a right extinguiſhed, after the lapſe of twenty years, provided there are no intermediate acts, by which that preſumption is repelled. The moſt common application of this principle is, that after a perſon, to whom an eſtate has been conveyed by way of mortgage, has been twenty years in poſſeſſion, without rendering any account, the equity of redemption ſhall be held to have been releaſed or abandoned; but if there are any acts within the twenty years, admitting the relative characters of mortgagor and mortgagee, the preſumption is deſtroyed, and the time can only be computed from the laſt act, which is indicative of ſuch an admiſſion.

It is a maxim in equity, that no length of time is a bar in caſes of fraud: where the fraudulent act is clear and manifeſt, the application of this rule is perfectly proper and conſiſtent with the diſcretionary powers of a court of equity; but where a fraud is to be inferred from a complication of facts, and the delay in adducing the charge is not ſatisfactorily accounted for, it may be right to reflect upon the principles, on account of which any limitation is introduced, and which principally regard the difficulty of accounting for the particulars of tranſactions obliterated from the memory, and of which the witneſſes may be dead or diſperſed. This topic occurred in the caſe of *Deloraine* v. *Brown*, 3 *Bro. Ch.* 633. which was decided upon a collateral point; but the Maſter of the Rolls, in a ſubſequent caſe, ſaid he referred to the arguments of counſel,

to ſhew that, even in a caſe of groſs fraud, the court does not do juſtice, by decreeing an account, after a conſiderable length of time, againſt executors, legatees, and innocent perſons, claiming under the fraudulent party. *Vide* 2 *Veſ. J.* 92, *Hercy* v. *Dinwoody*.

It is alſo held, that no length of time ſhall operate as a bar in caſes of truſt; but this rule can only be applied between the truſtee and the party intereſted in the execution of the truſt, and cannot be oppoſed to the right of a third perſon claiming in oppoſition to both; and even as between the immediate parties, where the truſt relates to ſome act of an evaneſcent nature, ſuch as the payment of a ſum of money, and not to any permanent intereſt, the length of time may be fairly regarded as evidence of performance.

The following recent caſes will ſhew, in a clear point of view, the regard paid by a court of equity to length of time in general, with the diſregard of that circumſtance, where the inconvenience which might otherwiſe ariſe was fully obviated.

A ſuit was inſtituted for a legacy, which was reſiſted on the ground of preſumed payment, ariſing from the length of time (being above forty years) which had elapſed without any demand, and becauſe all the perſons who could throw light upon the queſtion were dead, and the claim was diſallowed; Lord Commiſſioner *Eyre* obſerved, that it is a preſumption of fact, in legal proceedings, before juries, that claims, the moſt ſolemnly eſtabliſhed upon the face of them, will be preſumed to be ſatisfied after a certain length of time. Courts of equity would do very ill, by not adopting that rule. So eſſential is it to general juſtice, that though the preſumption has often happened to be againſt the truth of the fact, yet it is better, for the ends of general juſtice, that the preſumption ſhould be made and favoured, and not be eaſily rebutted, than to let in ſlight evidence of demands of this nature, from which infinite miſchief and injuſtice might ariſe. If he could indulge conjecture, he doubted about the payment of the legacy; he knew that in *Wales* there is a pious reverence for the repreſentatives of the family, and that the other relations are unwilling to preſs them, and will take theſe demands upon them by a little at a time. But the intereſts of general juſtice require that demands ſhould not be afterwards enforced in this way; and Lord Commiſſioner *Aſhburſt* ſaid, that all ſtatutes of limitations and preſcriptions, analogous to them, are to be favoured. *Jones* v. *Tuberville*, 2 *Veſ. Jun.* 11.

In the caſe of *Pickering* v. Lord *Stamford*, 2 *Veſ. Jun.* 272—581, a ſuit was inſtituted by perſons claiming as next of kin of *Thomas Walton*, who died above thirty years before, having directed by his will, that his perſonal eſtate ſhould be applied to ſuch charitable purpoſes as his executors ſhould direct. The executors eſtabliſhed a ſchool;

a ſchool; and the object of the ſuit was to recover ſo much of the perſonalty, veſted in the mortgagees, as had not been applied, (all diſpoſitions by will of money ſecured by mortgage to charitable uſes being void, by the ſtatute of mortmain). The Maſter of the Rolls, Sir *R. P. Arden*, upon the firſt hearing of the caſe, directed an inquiry to be made into the particular circumſtances, without prejudice as to the reſult; and upon that occaſion obſerved, that if a party, having knowledge of his rights, will ſit ſtill, and, without aſſerting them, permit perſons to act as if they did not exiſt, to acquire intereſts, and conſider themſelves as owners of property, to which the other will not aſſert his right, there is no reaſon why every preſumption ſhould not ariſe; as in the caſe of a bond.—Upon the inquiry which was directed, it appeared that the accounts had been kept ſo regularly, that there was no difficulty in aſcertaining the perſonal eſtate at the death of the teſtator. The Maſter of the Rolls, upon a full and able view of all the circumſtances of the caſe, decided in favour of the claim of the next of kin. The following are the paſſages of his opinion more immediately applicable to the ſubject before us: "The bill certainly requires very extraordinary circumſtances to ſuſtain it at ſo late a period; and the firſt queſtion is, whether, at this diſtance of time, it is too late to make the claim? The queſtion in all the caſes is, whether there are motives of public policy, or private inconvenience, to induce the court to ſay, that under all the circumſtances the ſuit ought not to be entertained? It is a very ſenſible rule, that parties ſhall not, by neglecting to bring forward their demands, put others to a ſtate of inconvenience, ſubjecting them to inſuperable difficulties. If, from the plaintiff's lying by, it is impoſſible for the defendants to render the accounts he calls for, or it will ſubject them to great inconvenience, he muſt ſuffer, or the court will interpoſe what is the beſt ground, public convenience. The queſtion is, whether theſe principles apply to this caſe? But firſt, I ſhall mention another ground; the preſumption that the demand itſelf has in ſome manner been ſatisfied or releaſed; that is a ground perfectly different from a bar, and prevails as much in a court of equity, as it has by modern determinations been wiſely held to do at law. Every preſumption that can be fairly made, ſhall be made againſt a ſtale demand. It may ariſe from the acts of the parties; or the very forbearance to make the demand affords a preſumption, either that the claimant is conſcious it was ſatisfied, or intended to relinquiſh it." It will not be neceſſary to ſtate the examination of the particular circumſtances from which his Honor very accurately concluded, that it was impoſſible, by any fair preſumption, to infer that the parties, being cognizant of their rights, ſlept upon them, or ever intended to re-

ſinquiſh, what he muſt ſay upon the whole complexion of the caſe, they never knew they had a right to.

" If the accounts of the perſonal eſtate (he proceeded to ſay) could not now be obtained, and it was impoſſible to know to what the plaintiffs were entitled, that is a ſufficient reaſon for ſaying, they ſhould not have it, and rob the charity, becauſe they could not tell what belonged to them, and what to the charity; but that unfortunately is not the caſe. Therefore, deſiring to be underſtood by no means to give any countenance to thoſe ſtale demands, but upon the circumſtances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the truſtees are not called upon to account for what has been diſburſed, I am bound to decide in favour of the plaintiffs."

In *Blewitt* v. *Thomas*, 2 *Veſ. Jun.* 669. length of time was pleaded in equity, as matter of defence, and as inducing the preſumption, that the demand was ſatisfied; and the plea was allowed. But in *Pearſon* v. *Belchier*, 4 *Veſ.* 627. the Maſter of the Rolls, while he held that a bill could not be entertained, on account of length of time, ſaid, that it could not be pleaded in bar in the court of Chancery. See alſo as to the following caſes, reſpecting the allowance or diſallowance of length of time, in oppoſition to an equitable claim, Earl of *Deloraine* v. *Brown*, 3 *Bro. Ch.* 633. *Hercy* v. *Dinwoody*, 4 *Bro. Ch.* 257. 2 *Veſ. Jun.* 87. *Ackerly* v. *Roe*, 5 *Veſ.* 565. *Harmood* v. *Oglander*, 6 *Veſ.* 199. In the caſe of *Sutton* v Earl of *Scarborough*, 1 *Veſ. N. S.* 71. (juſt publiſhed ſince this ſheet was ſent to the preſs), the Court of Chancery allows a plea of the ſtatute of limitations, to a bill in the nature of an action for money, had and received, both as to the diſcovery and relief; but the deciſion does not affect the caſe of a mere bill of diſcovery.

None of the ſtatutes of limitations contain any proviſion in favour of incorporeal rights, (except in caſe of rents). According to the rules of law, the right to theſe can only be founded upon an actual grant, or an immemorial preſcription which ſuppoſes a grant. But in order to eſtabliſh a right, as founded upon a grant, it would be unreaſonable to expect the production of the grant itſelf as a requiſite indiſpenſable to the ſupport of the title, which is derived from it. A long continued enjoyment, not otherwiſe to be accounted for, may, after ſuch a period of time as renders it probable that the deed may be loſt, or deſtroyed, be fairly conſidered as evidence of its former exiſtence; and from ſuch evidence, the jury may be fairly induced to infer the truth of any propoſition, which is not oppoſed by ſtronger evidence on the other ſide. But the deciſions of our courts have carried the matter much further than is warranted, by the mere application of this principle; and under the

the name of a preſumption, have, in effect, rendered the length of enjoyment a direct and ſubſtantive title.

It is held, that not only private grants, but records, and even acts of parliament, may be preſumed from length of time, and ſo far as any ſuch preſumption is founded upon a real unaffected opinion of the truth ſo preſumed, I ſubſcribe to the juſtice and propriety of the proceeding. Beyond that, whilſt I admit that the maintenance of a long eſtabliſhed enjoyment is a very deſirable object, I cannot forbear entertaining the opinion, that recent deciſions have exceeded the proper limits of judicial authority, and have introduced a principle, which, though it is now perhaps only open to controverſy, as a matter of ſpeculation, was not warranted by the fair rules of legal argument.

In the caſe of the Mayor of *Kingſton-upon-Hull* againſt *Horner*, *Cowp.* 102. a toll had been received by the corporation for upwards of 300 years, but the corporation itſelf having been created within the time of legal memory, it was impoſſible that the title could be founded upon preſcription; but it was left to the jury to infer from the uſage, whether there had not been a grant of the duties ſubſequent to the charter of incorporation; and the verdict founded upon the preſumption of ſuch a grant was ſupported by the court of King's Bench. But ſoon afterwards, Lord *Mansfield*, in referring to the authority of that caſe, advanced a poſition in favour of the principle, which I venture to conteſt. He ſaid, that a grant may be preſumed from great length of poſſeſſion. It was ſo done in the caſe of the corporation of *Hull* againſt *Horner*; "not that in ſuch caſes the court really thinks a grant has been made, becauſe it is not probable that a grant ſhould have exiſted, without its being upon record, but they preſume the fact for the purpoſe, and from a principle of quieting the poſſeſſion." *Cowp.* 214. That is, in a caſe of adverſe right, they profeſs, by way of form, to believe as true what, in point of fact, they believe to be falſe, in order that length of time may, by fiction and circuity, produce an effect to which directly and primarily it is inadequate.

By ſtatute, any quit-rent, which has not been paid for fifty years, is extinguiſhed; and there having been no payment of a quit-rent of half-a-crown, for thirty-ſeven years, that circumſtance was left to the jury, as a ground for preſuming an extinguiſhment or releaſe; but the court of King's Bench decided, that ſuch a preſumption was not warranted by the evidence. Lord *Mansfield*, on that occaſion, adverted to the principle, that the ſtatute of limitations is a poſitive bar from length of time, and operates ſo concluſively, that although the jury and the court are ſatisfied that the claim ſtill ſubſiſts, yet they are bound by the ſtatute to defeat it: that there are many caſes not within the ſtatute, where, from a principle of quieting

the poſſeſſion, the court has thought that a jury ſhould preſume any thing to ſupport a length of poſſeſſion. He then proceeded to the poſition from which I have expreſſed my diſſent, and afterwards ſhewed, from reaſoning adapted to the particular caſe, that there was no ground for inferring an extinguiſhment. Mr. Juſtice *Aſton*, in ſupport of the ſame opinion, obſerved, that a preſumption from length of time to ſupport a right was very different from a preſumption to defeat a right. *Eldridge* v. *Knott*, *Cowp.* 214.

But the caſe which ſeems to have had the moſt influence in modern determinations, is that of *Lewis* v. *Price*, tried before Mr. Juſtice *Wilmot*, at *Worceſter* aſſizes, in the year 1761, in which he ſaid, that where a houſe had been built forty years, and has had lights at the end of it, if the owner of the adjoining ground builds againſt them, ſo as to obſtruct them, an action lies, and this is founded upon the ſame reaſon as where they have been immemorial; for this is long enough to induce a preſumption, that there was originally ſome agreement between the parties: and he ſaid, that as twenty years was ſufficient to give a title in ejectment, on which he might recover the houſe itſelf, he ſaw no reaſon why it ſhould not be ſufficient to entitle him to any eaſement belonging to the houſe. *Eſpinaſſes' Dig.* 636. Afterwards, upon a motion for a new trial, twenty years' quiet and uninterrupted poſſeſſion of ancient lights (*a*) was deemed a ſufficient ground, from which a jury might preſume a grant. *Darwin* v. *Upton*, cited 3 *T. R.* 159. So far as length of time is merely regarded as a circumſtance, upon which a jury may exerciſe their judgment upon the real fact, I have already admitted the propriety of its influence. But now it has become a matter of daily and eſtabliſhed practice to adopt Mr. Juſtice *Wilmot*'s idea to its full extent, that twenty years' poſſeſſion gives a title to any eaſement. It is acted upon as a preſumption, *juris & de jure*, a legal fiction, upon which any argument or diſcuſſion is as much excluded as upon an averment of the defendant's being in the cuſtody of the Marſhal of the Marſhalſea, and not as a mere circumſtance open to the diſcuſſion and conſideration of a jury. And it has even been held, that the forbearance to exerciſe a right for twenty years ſhall produce an extinction of the right itſelf, and that all rights incident to land ſhall be referred to the criterion of twenty years' enjoyment.

Having been engaged in oppoſing the application of that principle, and having, in conjunction with ſome of the moſt diſtinguiſhed ornaments of the profeſſion, entertained the idea, that it was

(*a*) There ſeems to be either a redundancy or inaccuracy in this expreſſion. If the meaning was, that an enjoyment of twenty years was ſufficient to impreſs the character of antiquity, the epithet of *ancient* is implied in the ſtatement of the fact. If the word is uſed in its old and legitimate ſignification, the term of twenty years is out of the queſtion.

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APPENDIX, No. XVI.

(Referred to Vol. I. p. 474.)

On the Law of Evidence.

SECTION I.

General Preliminary Obſervations.

NO part of juriſprudence is of greater importance than the law of evidence: for the adminiſtration of juſtice muſt neceſſarily be preceded by the inveſtigation of truth, and the application of the law muſt in every caſe be founded upon the eſtabliſhment of the facts.

In adverting to this ſubject, we perceive one of the ſtrongeſt contraſts between moral and legal obligation. In the diſcharge of moral obligation, every man is a witneſs to himſelf with regard to his own conduct and intentions; but, in enforcing legal obligation, one man is called upon to form an eſtimate of the motives and conduct of another, of which in general he can only have an imperfect knowledge, and muſt act from repreſentations ſubject in their nature to every gradation of error and deception.

The two important objects to be provided for in eſtabliſhing a ſyſtem of evidence, are the manifeſtation of truth, and the excluſion of falſehood; but from the imperfection of human knowledge and perceptions, the full attainment of theſe is often impoſſible; the latitude which is requiſite for the one is inconſiſtent with the caution which is too often neceſſary for ſecuring the other; an exceſſive ſtrictneſs, excluding the admiſſion of truth, for the purpoſe of guarding againſt the dangers of falſehood, is equally attended with a falſe impreſſion injurious to the intereſts of juſtice; the negative falſehood, in the one caſe, being no leſs repugnant to an adequate repreſentation of the fact upon which juſtice is to decide, than the poſitive falſehood on the other; and the withholding an actual right being not leſs an act of injuſtice, than the commiſſion of an actual wrong. Whatever rule is eſtabliſhed in general, for the purpoſe of ſecuring theſe reſpective advantages, and avoiding either of theſe oppoſite incoveniences, muſt, from the very nature of the ſubject, be frequently defective, or erroneous

in its particular application; and all the perfection which judicial wiſdom can apply, muſt only conſiſt in the adoption of ſuch a ſyſtem as may, with reference to the ſtate and condition of ſociety, be productive of the greateſt ſum of advantage in the whole.

In examining the general principles of this ſubject, we diſcern two different kinds of facts, very diſtinguiſhable from each other: the firſt, embracing thoſe which at their occurrence are neceſſarily ſuſceptible of ſome indiſputable monument of authenticity, ſuch as the pronouncing a judicial ſentence; the other, comprizing acts of which the traces can only be preſerved in the memory of thoſe who were the witneſſes of them, ſuch as offences and injuries; but between theſe are various intermediate degrees of ſubjects, ſuſceptible in their nature of ſimilar gradations of authenticity.

The intereſt of ſociety is greatly promoted, by eſtabliſhing authentic criteria of judicial certainty, ſo far as this object can be effectuated without materially interfering with the claims of general convenience. Where the acts which may become the ſubject of examination will admit of deliberate preparation, and the purpoſes of them evince the propriety of a formal memorial of their occurrence, more eſpecially when they are from their nature ſubject to error and miſrepreſentation, it is reaſonable to expect that thoſe who are intereſted in their preſervation ſhould provide for it in a manner previouſly regulated and eſtabliſhed, or that, in caſe of neglect, their particular intereſt ſhould be deemed ſubordinate to the great purpoſes of general certainty. But it is alſo certain that this ſyſtem of precaution may be carried too far, by the exaction of formalities, cumberſome and inconvenient to the general intercourſe of civil tranſactions; the ſpecial application of theſe principles muſt be chiefly governed by municipal regulations: but as a general obſervation, it is evident that the great excellence of any particular ſyſtem muſt conſiſt in requiring as much certainty and regularity as is conſiſtent with general convenience, and in admitting as much latitude to private convenience as is conſiſtent with general certainty and regularity. It may be added, that for theſe purpoſes every regulation ſhould be attended with the moſt indiſputable perſpicuity; and that the eſtabliſhed forms ſhould be cautiouſly preſerved from any intricacy or ſtrictneſs, that may tend to perplex and embarraſs the ſubjects which they were deſigned to elucidate, and to endanger and deſtroy the ſubſtance which they were inſtituted to defend (*a*).

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(*a*) The annuity act is a ſtrong inſtance of the application of formal requiſites, the defect of which is ſubverſive of the tranſaction in numerous inſtances, where there could not be poſſibly any other intention than a ſtrict and fair compliance with its directions

SECTION II.

Of the Onus Probandi.

The principle, "that he who alleges himſelf to be the creditor of another, is obliged to prove the fact or agreement upon which his claim is founded, when it is conteſted; and that, on the other hand when the obligation is proved, the debtor who alleges that he has diſcharged it, is obliged to prove the payment," is clearly one of thoſe propoſitions in which every ſyſtem of juriſprudence muſt concur in general, whatever particular rules may be adopted, as to the mode and form of the allegation by which the neceſſity of ſuch proof is to be determined.

That preciſion of allegation, which is required by the *Engliſh* rules of ſpecial pleading, is particularly well calculated to aſcertain the incumbency of the proof, which is to be made by the reſpective parties; and the principles which regulate the obligation of proof, where ſtrictneſs of pleading is required, may frequently aſſiſt in the expoſition of the law, where the allegations are of a more general nature.

The ſame rules which preſcribe the original obligation of proof, will alſo be frequently material in deciding upon the application of it, where the oppoſite proofs are ſo much in conflict, either in reſpect to the credibility of teſtimony, or the inferences to be deduced from admitted facts, that the mind, upon a patient and attentive conſideration, is unable ſatisfactorily to form a concluſion upon their relative force; ſince it is manifeſt that whoever is under the neceſſity of eſtabliſhing a given allegation, muſt adduce, not merely an equality, but a preponderance of proof.

It is ſometimes too generally contended, that in caſe of oppoſition of teſtimony, the plaintiff, on whom it is incumbent to prove the caſe, muſt maintain his right to recover by an abſolute preponderance of teſtimony; but this is only true ſo far as it is requiſite to eſtabliſh a preſumptive and *prima facie* caſe; and whenever a fixed and undiſputed point is eſtabliſhed by either party, it is from that point that the conflict muſt commence, whether in thoſe caſes where the allegations are particular, or in thoſe where the whole matter in diſpute is open upon general pleading. Thus, if a plaintiff eſtabliſhes a poſſeſſion of any article taken from him by

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tions. The abuſes to which the contract was ſubject, induced the legiſlature to preſcribe certain indications for their notoriety; but in the conſtruction of the proviſions adopted for this purpoſe, a ſyſtem of chicane has been eſtabliſhed of ſo extenſive a nature, as almoſt to deſtroy any certainty or confidence in the apparent regularity of the contract, and its incidental accompaniments.

the defendant, and the defendant asserts a right of property, upon which the evidence given by the respective parties does not lead to a decisive preponderance; the decision should be in favour of the plaintiff; his possession being an adequate title, until a superior property is proved by a preponderance of evidence on the other side. So, if an heir at law claims as a plaintiff in ejectment, and his consanguinity is established or admitted, he will be entitled to the advantage in case of equivalent proofs, in affirmance or contradiction of an adverse will. If the respondent, in a sessions appeal, fixes an original settlement with the appellant, the obligation of proof is transferred, and the establishing a preponderance of evidence of a subsequent settlement becomes the business of the appellant. And, generally, whoever asserts a claim, or negatives a claim, which without contradiction would be sufficiently established, must support his position either by circumstances inducing a legal presumption in his favour, or by proofs in opposition to what the law presumes against him, or respecting which the law is passive in not establishing any presumption on the one side or the other.

A confusion in practice, which I have occasionally been witness to, has induced me to state the preceding observations, in themselves sufficiently obvious, with some particularity and perhaps prolixity.

They coincide in substance with the general position of *Gilbert*, "that in all courts of justice the affirmative is to be proved, for it is sufficient to deny what is barely affirmed until the contrary be proved; and this is a rule both in the common and civil law. The civil law says, *Probatio imponitur ei qui allegat, negantis autem per rerum naturam nulla est probatio.* But where the law supposes the matter contained in the issue, there the opposite party must be put to the proof of it by a negative, as in the issue *ne unques accouple en loyal matrimonie*, the law will suppose the affirmative without proof, because the law will not easily suppose any person criminal, and therefore the defendant must begin with proving the negative (*a*)."

(*a*) Mr. *Leffi*, in his edition of *Gilbert*, very frequently takes greater liberty with the text of his author than the functions of an editor will fairly warrant. At this place his interpolation of the text involves a complete inconsistency from the passage which he professes to expound. After the words above mentioned, he adds, "that the marriage was lawful." Now the text of *Gilbert* means that a marriage shall be presumed good; and that the defendant who impeaches it by his plea, shall be put to shew that it was not so, at the same time the plaintiff having averred a general illegality, the defendant, from the nature of the case, is put to shew on what marriage, under what circumstances and qualifications he relies. It is therefore in truth the defendant must begin by offering evidence to prove the legality of the marriage.

a deviation from the regular courſe of the law, to give the effect of a bar to a mere preſumption; whilſt I ſubmit to the contrary adjudication of the court, I cannot, upon the moſt frequent conſideration, adopt the reaſoning upon which that adjudication proceeded; and hope I ſhall not incur the imputation of preſumption, by ſtating the argument, by which it was oppoſed; fully aware of the influence of that prejudice which reſults from a profeſſional engagement, and of the deference which is due to judicial authority.

I would previouſly ſuggeſt, that the analogy ſtated by Mr. Juſtice *Wilmot* is apparently ſubject to two objections; 1ſt, It is an analogy of common law, drawn from the proviſions of a particular ſtatute. The ſtatute profeſſedly introduces an alteration in the law, and it is the only authority by which ſuch an alteration can be properly made. The courts of juſtice muſt take the law as they find it, and are not authoriſed to ſay, that becauſe the Legiſlature has made an alteration, which we find to be beneficial in one caſe, therefore, we will make an alteration in another caſe, where the ſame beneficial effects will probably enſue. But 2d, the principle of the ſtatute of limitations is, that it operates upon an adverſe poſſeſſion, upon one perſon enjoying property which another was authoriſed to claim, and the omiſſion of claiming which is a mark of negligence, and therefore ſhould be diſcouraged: whereas, the uſe of an eaſement is not in every inſtance an uſurpation of property; it may not be ſubject to an action; and whilſt the owner of the adjacent property is not injured in his own poſſeſſion, he has no cauſe of complaint. But it would be injurious to debar him from the full enjoyment of the rights incident to his own property, ſuch as the building upon his land, becauſe another perſon had previouſly built on a contiguous part of the adjoining land, though, in doing ſo, he had not rendered himſelf liable to any action, but had only been ſubject to the imputation of folly, by placing his windows in a ſituation where they were liable to be obſtructed (*a*). Whatever may be fairly aſcribed to courteſy, or forbearance, ought not haſtily to be conſtrued as the exerciſe of an adverſe right; much leſs ſhould any act allowed to have the effects of an adverſe poſſeſſion, where there could be no right of conteſt, and conſequently no imputation of laches.

(*a*) If a perſon places windows contiguous to my land, I muſt, according to modern practice, put myſelf to the expence of erecting a building to obſtruct them, within the ſpace of twenty years, which may be attended with detriment and inconvenience to me, or I muſt be decreed to have made a grant and ſurrender of the rights which previouſly belonged to me. The practical inconvenience of this is perhaps not very great, with reſpect to buildings recently erected, for the modern deciſions are ſufficiently notorious, and the requiſite precaution is generally taken; but many rights have been loſt or prejudiced, for want of knowing, by the ſpirit of prophecy, that ſuch a ſyſtem would have been eſtabliſhed.

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In the caſe of *Preſcott* and *Phillips*, which was tried at *Cheſter* Spring aſſizes, 1797, it appeared, that the perſons, under whom the defendant claimed, had an ancient mill and weir, which were permitted to fall into decay; and after a period of twenty years, above nineteen years before the commencement of the action, another mill was erected (upon which it may be aſſumed, for the purpoſe of the argument, that there was no alteration in the ſcite or fall, as no reference was made to theſe circumſtances), no act having been done in the mean time by the owners of the adjacent land, adverſe to the right. The judges at the aſſizes, and afterwards in the court of King's Bench, were of opinion, that the ceſſer of twenty years, in the enjoyment, was an extinguiſhment of the right to the watercourſe; and, upon that general principle, decided in favour of the plaintiff, treating it as a caſe which would not even warrant an argument (*a*).

The obſervations which occurred to the preſent writer, in ſupport of the poſition, that it ought not to be preſumed that the ancient right was loſt or abandoned, were, 1ſt, That no inconſiſtent or adverſe enjoyment had been acquired; 2d, Becauſe the traces of the ancient right remained at the time of the new erection; 3d, Becauſe ſo long a period having elapſed ſince the preſent erection, without the right being judicially queſtioned, it ought to be preſumed, that that was in purſuance of, and connected with, the ancient right. An analogy has been adopted to the ſtatute of limitations, in the caſes of corporate offices, eaſements and bonds. But the ſtatute of limitations, in caſes of ejectment, only operates upon acts of adverſe poſſeſſion, not permitting an undiſturbed poſſeſſion and actual enjoyment to be defeated. In caſes of corporate offices, the King's Bench proceeded upon the exerciſe of a diſcretionary power, and always in protection of a poſitive and actual enjoyment. None of the caſes embrace the principle, that a right is loſt by neglect, there having been no adverſe enjoyment; and the protection is merely perſonal and individual. Upon the death of the corporator, the right reverts according to the original conſtitution.

In reſpect to eaſements, all the caſes are in ſupport of poſitive acts, as the making windows: there an enjoyment was actually acquired, which the court would not ſuffer to be defeated. There was a caſe in *Surry*, before Lord *Mansfield*, who laid it down, that an incorporeal right, which, if exiſting, *muſt be in conſtant uſe*, ought to be decided by analogy to the ſtatute of limitations. *Muſt be in*

(*a*) The defendant's counſel, in fact, obtained a hearing, but not without difficulty; and the judgment of the court, in a great degree, conſiſted in complaining of the length of time which had been occupied upon a point too plain for argument.

conſtant

conſtant uſe, is emphatic. But *non conſtat*, that a right muſt be in conſtant uſe, the exerciſe of which is attended with expence and riſk. The party has not ſubmitted to any actual inconvenience, which he might have avoided by the aſſertion of his right; he has merely not deemed it neceſſary to exerciſe a right, which may or may not be beneficial, according to times and circumſtances; he has not acquieſced in any act tending to contradict or invalidate it. If *A.* buys of *B.* the coals under a piece of land, and of *C.* a right of road to theſe coals through a barren moor, and declines getting the coals for twenty years (the place continuing a barren moor), is the grant void or loſt? Here, at the time when the mill was ſuffered to fall into decay, the right was as great as if an original right to dam up the water had been granted at that time. If, after ſuch grant, the plaintiff had made a weir, and enjoyed it for twenty years, the grant or right might be preſumed to have been ſurrendered. That is a caſe of adverſe enjoyment; but merely ſuffering the river to run in its natural courſe, is reducing it to the caſe of a barren moor; and the caſe of *Eldridge* and *Knott* eſtabliſhes the poſition, that the mere non-enjoyment of an incorporeal right does not neceſſarily induce the preſumption of its extinguiſhment. With reſpect to bonds, a perſonal demand ſhould, from the nature of it, be recently purſued, and the non-claim of twenty years is a ſtrong preſumption of payment; but this is no wiſe ſimilar in principle to a right connected with the optional mode of enjoying a real eſtate.

The court of Common Pleas have ſince decided, in an action brought by the owner of a market at *Southall*, for erecting another market at *Hayes*, within three miles, that the erection of pens, and the ſale of cattle in them, for twenty years, was a clear bar to the right of action. *Holcroft* v. *Heel*, 1 *Boſ.* 400.

The attempt to found a right upon an enjoyment of twenty years, was carried to the moſt extravagant length, in a caſe which was brought to trial at *Lancaſter* Summer aſſizes, 1800. A defendant, in juſtification of a treſpaſs, pleaded that the owners of a meſſuage had, from time immemorial, enjoyed the right of ſhooting upon the plaintiff's land; and it was intended to be proved, that the defendant and his father had been in the habit of ſporting there upwards of twenty years. But the counſel for the defendant did not perſiſt in an attempt which could only have ſubjected themſelves to equal ridicule with their client.

The preſent diſcuſſion has been compoſed for ſeveral years, and I have ingrafted the ſubſtance of it into the view of the deciſions of Lord

Lord *Mansfield*; a work in which I have had the mortification to experience a total sacrifice of a considerable portion of assiduity and expence. Since that time, the subject has been before the court of King's Bench, in the case of *Campbell* v. *Wilson*, 3 *East*. 294. The defendant had, for upwards of twenty years, used a way over the plaintiff's land, the right to which, if it really existed, must, from the circumstance of the case, necessarily have commenced within thirty years; but there was evidence to shew, that the possession was adverse: on the other side, there were circumstances to shew the probability of the claim having originated in mistake. Mr. Justice *Chambre* observed to the jury, that it was probable that the enjoyment did originate in the mistake supposed; but however that might be, if they were satisfied that it was adverse, and had continued twenty years, it was sufficient ground for presuming a grant. Upon a motion for a new trial, Lord *Ellenborough* observed, that it came to the common case of an adverse possession of a way for twenty years, without any thing to qualify that adverse enjoyment; and there was no reason why the jury should not, as in other cases, make the presumption, that the defendant acted by right. Mr. J. *Grose* thought that in substance the question was left to the jury, whether the enjoyment originated in a grant, or in any other manner? and therefore, he could not say, but that upon the evidence the jury might not make the presumption which they had done, though, had he been one of them, he did not know that he should have dared to do so. Mr. Justice *Lawrence* said, no doubt adverse enjoyment for twenty years, unexplained, is evidence sufficient for the jury to found a presumption that it was a legal enjoyment. Mr. Justice *Le Blanc* thought that such length of enjoyment was so strong evidence of a right, that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant. The same learned judge explained the case respecting *Hayes* market to have only amounted to an intimation, that it would be left to the jury to find for the defendant, upon the ground of presumption of a grant, after twenty years uninterrupted use. And Mr. J. *Grose* said, he assented to that case, as so explained, but no further.

In reviewing the preceding opinions, Mr. Justice *Grose* seems to concur in the opinion which I have endeavoured to maintain; that the presumption in these cases is real matter of inference; upon which the jury are, as in other cases of circumstantial evidence, to exercise a genuine opinion as to the existence or non-existence of the fact in question. But I cannot concur with him in thinking, that such was really the spirit of the directions to the jury in the particular case. The other judges certainly appear to support the fictitious

tious preſumption (*a*), that although, in point of fact, no legal title exiſted, the adverſe poſſeſſion of twenty years was to be deemed ſufficient to conſtitute ſuch title, and that the falſe ſuppoſition of a grant, deſtroyed by time or accident, was the mode and form in which that right is to be maintained.

(*a*) There are, in truth, two kinds of preſumption, acted upon in the law, which ſcarcely agree in any thing but the name: 1ſt, Inferences of fact, really and *bona fide* made; as where a perſon, having the recent poſſeſſion of ſtolen goods, is preſumed to be the thief; 2. Preſumptions of form; as where a ſatisfied term is preſumed to be ſurrendered, though, in fact, no ſuch thing is believed to have taken place. And to the latter claſs, the practical application of the preſumption in queſtion is certainly to be referred; becauſe in moſt of the caſes, it is impoſſible to ſuppoſe that any perſon in his ſenſes can believe the fact to be true, which is ſaid to be preſumed. Juries are never called upon to balance between the improbability of an enjoyment having ſubſiſted for twenty years, without a legal grant, and the oppoſite and infinitely greater improbability, if ſo gentle a term can be applied to what is abſolutely incredible, that within twenty years a deed creating a right, or even a grant from the crown (an act which muſt be upon record), ſhould have actually been made, and that every trace of its exiſtence ſhould be loſt and obliterated.

In fact, courts have departed from their proper province, whenever they have preſcribed to a jury the inference which they are to draw from given facts: and twenty years, or any other arbitrary period, can never be the ground of a legitimate inference; which muſt always depend upon the general combination of circumſtances.

In the caſe of *Campbell* v. *Wilſon*, the jury were told, that if the enjoyment had been by *leave or favour, or otherwiſe than as a claim or aſſertion of a right*, it would repel the preſumption of a grant: but this principle would deſtroy the modern doctrine, ſo far as relates to the enjoyment of lights, as has already been particularly ſhewn.

I will not contend that, after the deciſions which have taken place, it may not be more convenient to the public, that the doctrine which has been extenſively acted upon in the enjoyment of real eſtates, ſhould be adhered to than departed from, though of very modern origin. This differs from the caſes in which I contend for the departure from erroneous precedent, on account of the conſequences being merely proſpective: but I ſhall ever retain the ſentiment, that the introduction of ſuch a doctrine was a perverſion of legal principles, and an unwarrantable aſſumption of authority. See the caſes upon this ſubject, collected in *Mr. Serjeant Williams's* note to *Yard* v. *Ford*, 2 *Saund.* 175.

APPEN-

In an information againſt Lord *Halifax*, for refuſing to deliver up the rolls of the auditor of the exchequer, the court of exchequer put the plaintiff upon proving the negative, viz. that he did not deliver them up; for a perſon ſhall be preſumed duly to execute his office, until the contrary appear. *Bull. N. P.* 298.

In a very recent caſe, an action was brought againſt the *Eaſt India* Company, for putting an inflammable ſubſtance on board a ſhip, without giving ſufficient notice thereof to the captain; and it was reſolved, that the proof that ſuch notice had not been given lay upon the plaintiff. Lord *Ellenborough*, in delivering the opinion of the court, ſaid, that where any act is required to be done on the one part, ſo that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law preſumes the affirmative, and throws the burthen of proving the contrary, that is, in ſuch caſe, of proving a negative, on the other ſide. *Williams v. E. I. C.* 3 *Eaſt*, 192.

To a plea of infancy, the plaintiff replied a confirmation after the defendant came of age, and merely proved a promiſe; and it was held to be incumbent upon the defendant, to prove his being under age, that being a matter within his own knowledge, which it might be impoſſible for the plaintiff to prove. *Buller* J. ſaid, he did not agree to a general poſition, to the extent in which it was laid down, that the plaintiff is bound to prove every thing which he alleges. For in actions on the game-laws, although it is neceſſary to allege that the defendant was not qualified, yet the plaintiff need only prove the offence; and then, if the defendant is really qualified, it is incumbent on him to ſhew it. *Groſe* J. ſaid, it is preſumed that when a man contracts, he is of proper age to contract, until the contrary be ſhewn. *Borthwick* v. *Carruthers*, 1 *T. R.* 648.

A debtor of a bankrupt, ſetting off notes of the bankrupt indorſed to himſelf, muſt prove that they were indorſed to him before the bankruptcy; and by *Aſhhurſt* J.—It is a general rule of evidence, that in every caſe the *onus probandi* lies upon the perſon who wiſhes to ſupport his caſe by a particular fact, and of which he is ſuppoſed to be cognizant. *Dickſon and others, aſſignees*, v. *Evans*, 6 *T. R.* 57.

In an action for loſs by barratry of the maſter, upon a policy of inſurance upon goods, a *barratrous* act being proved, it was objected that the plaintiff ought to have ſhewn, that the maſter was not alſo the owner or freighter of the ſhip, in which caſe no barratry could be committed; but it was ruled, that it was not incumbent on the plaintiff to make ſuch proof, for that would be calling upon him to prove a negative, and the proof of the fact, which operates in diſcharge of the other party, lies upon him. *Roſs* v. *Hunter*, 4 *T. R.* 33.

The position incidentally mentioned in one of the preceding cases, that in an *action* upon the game-laws, it is not necessary for the plaintiff to prove the defendant's want of qualification, is always followed in practice; but it is a disputed point whether that doctrine extends to summary convictions before justices of peace; and the judges of the King's-bench were equally divided upon that question, in the case of *The King* v. *Stone*, 1 *East*, 639. A case of *The King* v. *Jarvis*, in which a conviction was held bad, the want of the several qualifications required by law, not being alleged in the information, or shewn by evidence, was much relied upon by Lord *Kenyon* and Mr. Justice *Grose*, in support of the necessity of negativing the qualifications by evidence; but it is evident, that any opinion of the necessity of giving such evidence was in that case superfluous, the necessity of negativing the qualifications in the information being a ground abundantly sufficient for setting aside the conviction. It is remarkable, that whilst Lord *Kenyon* was very tenacious of the authority of one case, he observed, with reference to another, that he had often thought there was found sense in what was once said by Lord Ch. J. *Eyre*, that the sooner a bad precedent was gotten rid of the better. The judges gave their respective opinions, as to the principle of requiring such evidence. Lord *Kenyon* argued in support of such requisition, and of the necessity of keeping a strict hand over the summary proceedings of magistrates. Mr. Justice *Grose* evidently submitted to the supposed weight of authority, in opposition to his own opinion, respecting the reason of the case. Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* thought the evidence not requisite; the latter said, "I do not know that there are different rules of evidence, in case of proceedings before magistrates, from those which apply to actions in the courts above. And if the court were to determine, that it was necessary for the witness to negative the defendant's qualifications, I do not see why it must not be equally necessary to give the same evidence before a judge and jury, in an action for the penalty. Whatever is an authority for the one must, I think, equally bind the other."

Whatever may be hereafter determined respecting the law, I conceive that there can be little doubt respecting the reason of the opinion last cited. The forms of proceedings before different tribunals are in their nature matter of arbitrary regulation, but the general principles of natural reason and justice, which ought to determine the administration of the law respecting evidence, where no positive institutions intervene, ought to be equally the rule of conduct of the highest tribunal and the lowest.

According to the practice which formerly prevailed at some quarter-sessions, the appellants against an order of removal were

bound, in the firſt place, to ſhew the ſettlement of the pauper out of their own pariſh. *Vid. Rex.* v. *Woodford, Cald.* 236. This rule ſeems utterly repugnant to principle; becauſe a removal to a pariſh is in the nature of an affirmation that the ſettlement is there, and ſhould be founded upon ſome evidence of the fact. The rule that an order confirmed is good againſt all the world, but an order reverſed is only concluſive between the particular pariſhes, ſtrongly indicates where the original proof ſhould be; and ſhews that an order ſhould only be confirmed upon evidence of an actual ſettlement, and that it may be reverſed for defect of proof; and I believe that the practice alluded to is now univerſally exploded.

SECTION III.

Of the Rule requiring the beſt Evidence the Nature of the Caſe will admit.

All ſyſtems of law recognize a leading diſtinction between written and verbal evidence; and written evidence is ſubdivided into ſeveral claſſes of relative ſuperiority and inferiority, beginning with public authentic acts, and deſcending to private *memoranda*. Written evidence is ſuperior to verbal, as it is by no means equally liable to miſconception, or miſrepreſentation. And an original is, for reaſons equally evident, ſuperior to a copy.

A grand rule of evidence in the Engliſh law is, that the beſt evidence muſt be given, which the nature of the caſe will admit; a ſlight ambiguity in the expreſſion of this rule may, and frequently does, lead to conſiderable miſconception, in thoſe who are but ſuperficially acquainted with the law, and who ſometimes conceive not only that it is incumbent upon a party to give the beſt attainable evidence of exiſting circumſtances, but that the circumſtances themſelves muſt be ſuch as give the moſt diſtinct poſſible view of the diſputed fact; and in other caſes, where the circumſtances of the caſe are not ſuſceptible of legitimate evidence, that evidence, in its nature inadmiſſible, may be allowed as a ſubſtitute; both of which errors I have known to be the ſources of judicial determinations, but it was in courts the judges of which have not neceſſarily a profeſſional connection with the law, although very extenſively engaged in the adminiſtration of it. But Lord Ch. Baron *Gilbert*, whoſe law of evidence is the moſt uſeful guide in inveſtigating the general ſubject before us, obviates the firſt miſconception by obſerving, that the true meaning of the rule of law, that requires the greateſt evidence that the nature of the thing is capable of, is this, That no ſuch evidence ſhall be brought, which *ex rei naturâ* ſuppoſes ſtill a greater evidence behind, in the party's own poſſeſſion; for ſuch evidence is altogether inſufficient, and

proves nothing, for it carries a preſumption with it contrary to the intent for which it was produced; as if a man offers a copy of a deed, or will, where he ought to produce the original, this carries a preſumption with it, that there is ſomething more in the deed, or will, that makes againſt the party, or elſe he would have produced it, and therefore the copy is not evidence, and cannot weigh any thing in a court of juſtice. The ſame principle is expounded more fully in a very elaborate judgment of one of the courts of *North Carolina*, (upon a queſtion which, in an Engliſh court, would not admit of much debate, the neceſſity of a deed being atteſted by a ſubſcribing witneſs,) from which I ſhall tranſcribe the following extract, as affording not an unfavourable ſpecimen of the juridical reaſoning which prevails in thoſe courts. "There is but one decided rule in relation to evidence, and that is, that the law requires the beſt evidence. But this rule is always relaxed upon two grounds, either from abſolute neceſſity, or a neceſſity preſumed from the common occurrences amongſt mankind. The rule is not ſo ſtubborn but that it will bend to the neceſſities of mankind, and to circumſtances not under their control. The rule is adopted only to obviate the fraud of mankind: one ſhall not deceive the jury by offering a leſs convincing teſtimony to eſtabliſh his point, when it appears there is a proof more elucidative of the point in controverſy in his own power, which, perhaps, he does not offer, becauſe it would be deciſive againſt him. It was never meant to exclude the party from juſtice, merely becauſe he had not, through ignorance, provided himſelf originally with the beſt evidence it was poſſible for him to provide; for then two witneſſes would be better than one, a hundred than two, and ſo on progreſſively. A writing would be better than a parol contract, a deed better than either, and a record better than all. Neither was it intended to deprive any one of juſtice, when, without any default in himſelf, he had loſt the better evidence, which he had provided originally. It firſt deprives him of the power of impoſing upon us, and then lays itſelf open to be relaxed as circumſtances ſhall, in juſtice, require. Theſe circumſtances are of two kinds, thoſe founded on abſolute neceſſity, and thoſe founded on a neceſſity occaſioned by the occurrences which are common amongſt mankind."

The greater part of the particular ſyſtem which is eſtabliſhed reſpecting the law of evidence, may be regarded as an amplification and expoſition of this general rule.

It is to be obſerved that this, as well as moſt other rules of evidence, are chiefly referable to the admiſſibility of the proof required, and of courſe are preliminary to any conſiderations reſpecting its weight and efficacy. But the ſame principle which dictates the rule, concerning the admiſſion of evidence, may be often ad-

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vantageouſly applied in the diſcuſſion of its effect. The infinite variety of tranſactions which occur in the intercourſe of ſociety, muſt in general prevent the adoption of a ſyſtem for determining what evidence ſhall be requiſite for the deciſion of any conteſted fact, not requiring the formality of a written atteſtation; but when weaker and leſs ſatisfactory teſtimony is tendered in ſupport of a fact, the nature of which will admit of illucidation, from proofs of a more direct and explicit character, the ſame caution which rejects evidence of an inferior degree, when higher evidence might be produced, will awaken ſuſpicion; and it will reaſonably be ſuppoſed, that a more perfect expoſition of the ſubject would have laid open deficiencies and objections, which a more obſcure and uncertain repreſentation was intended to conceal. But there is ſtill an important diſtinction to be attended to: the rules for the admiſſion of evidence are abſolute and imperative, and will not admit of any relaxation from conſiderations of inconvenience and expence; whereas, in forming a judgment upon the adequacy of teſtimony, in particular caſes, circumſtances which remove the cauſe of ſuſpicion may alſo be admitted to obviate the effect.

Although the rule of law is for the moſt part confined to the known ranks and degrees of evidence, there are inſtances of its application to the more or leſs adequate repreſentation of facts. Thus in the caſe of *Williams* againſt the *Eaſt India* Company, 3 *Eaſt*, 192. referred to upon another ground in the preceding ſection, it was alleged, that an inflammable ſubſtance had been put on board a ſhip, without giving a proper intimation. It appeared to be the duty of the conductor of military ſtores, to carry the goods on board, and of the chief mate to receive them; the mate was dead, and no evidence was given of what paſſed between him and the conductor of ſtores; but it was proved by the captain and ſecond mate, that no communication had been made to them, of the nature of the ſubſtance in queſtion. It was objected, and decided, that the officer who had put the article on board ought to have been examined. Lord *Ellenborough*, in delivering the opinion of the court, ſaid, The queſtion is, whether the plaintiff has given ſufficient *primâ facie* evidence of the want of notice, to have gone to a jury? and we are of opinion that he has not. The beſt evidence ſhould have been given of which the nature of the thing was capable. The beſt evidence was to have been had by calling, in the firſt inſtance, upon the perſons immediately and officially employed in the delivering, and in receiving, the goods on board, who appear, in this caſe, to have been the firſt mate on the one ſide, and the military conductor on the other. And though one of theſe perſons, the mate, was dead, it did not warrant the reſorting

to an inferior and ſecondary ſpecies of teſtimony, viz. the preſumption and inference ariſing from a non-communication to other perſons on board, as long as the military conductor, the other living witneſs, immediately and primarily concerned in the tranſaction of ſhipping the goods on board, could be reſorted to (*a*).

The preference of written to parol evidence is a firſt principle of the law; but ſometimes where a writing itſelf does not conſtitute the very act under inquiry, but is only evidence of the exiſtence of a diſtinct collateral fact, parol evidence may be allowed in reſpect to ſuch fact, in the abſence of, or even in oppoſition to, the evidence furniſhed by the writing. This ſubject will be examined at length in a following ſection, and is only referred to at preſent as introductory to the following caſe, which is ſtated here with a view to aſſiſt in the expoſition of the general principle.

The plaintiff had advanced ſeveral ſums of money to the defendant, which he entered in his book; and the defendant ſigned the ſeveral pages which were not ſtamped. At a ſubſequent time, a clerk of the plaintiff examined the book with the defendant, who admitted the entries to be correct. It was agreed that the book could not be given in evidence, as it conſiſted of receipts unſtamped; but it was contended on the part of the defendant, that the book was the beſt evidence of the items ſo admitted, and was neceſſary to be produced; but the court decided otherwiſe. Lord *Kenyon* ſaid, that the ſubſequent verbal acknowledgment, that the defendant had received the money, was evidence to go to the jury of his having been furniſhed with it. *Groſe*, J.—The evidence was not of a receipt but of a verbal admiſſion, proved not by the ſignature to the account, but by the teſtimony of the witneſs, to whom the admiſſion was made. *Lawrence*, J.—If there had been no ſignature, it could not be pretended but that if the witneſs had uſed the book, to aſk the defendant if he had had the ſums contained in it, his admiſſion would have been evidence. And the ſignature cannot make it leſs evidence for the purpoſe for which it was produced. *Le Blanc*, J.—The objection is, that there can be no verbal admiſſion of a party having been furniſhed with articles in

(*a*) In the above caſe it muſt be obvious that there would be an averſion to calling the officer in queſtion, whoſe own intereſt would be ſo much in oppoſition to that of the party required to produce him, that his evidence might have been objected to as incompetent, if adduced on the part of the defendant. With proper deference, I cannot but entertain the idea, that the non-production of this witneſs was not ſo much a ground of objection to the admiſſibility of the other evidence, as of obſervation upon the effect of it; and even that ſubject to very ſtrong obſervation, on the oppoſite ſide, of the reaſonableneſs of apprehending a bias in the witneſs, inconſiſtent with fairneſs and impartiality, whilſt any imputation ariſing from the party producing him would be repelled, by a clamour againſt impeaching the veracity of a witneſs produced by themſelves.

an account, to which he has affixed his ſignature; but that cannot be ſupported. *Jacob* v. *Lindſay*, 1 *Eaſt*, 460.

There are ſome caſes, in which preſumptive and *primâ facie* evidence of a neceſſary fact is allowed, although the nature of the ſubject would admit of evidence of a higher and more authentic kind. Thus, in an action for defamation of a perſon in his character of an attorney, it was held not to be neceſſary to prove the plaintiff's admiſſion; and *Buller*, J. ſaid, That in the caſe of all peace officers, juſtices of the peace, conſtables, &c. it was ſufficient to prove that they acted in thoſe characters, without producing their appointments, in actions brought by attornies for their fees, the proof now inſiſted upon has never been required. Neither in actions for tithes is it neceſſary for the incumbent to prove preſentation, inſtitution, and induction; proof that he received the tithes, and acted as the incumbent, is ſufficient, *Berryman* v. *Will*, 4. *T. R.* 366. And in a very late caſe it was held in an action, upon a policy of inſurance on a ſhip, that the mere fact of poſſeſſion as owners was ſufficient and *primâ facie* evidence of ownerſhip, without the aid of any documentary proof or title deeds on the ſubject, until ſuch further evidence ſhould be rendered neceſſary in ſupport of the *primâ facie* caſe of ownerſhip which they made, in conſequence of the adduction of ſome contrary proof on the other ſide. *Robertſon* v. *French*, 4 *Eaſt*, 130.

SECTION IV.

Of Public Evidence.

Written evidence is, by *Gilbert*, divided into public and private, and the former into records and matters of inferior nature.

Records are defined by him to be the memorials of the legiſlature, and of the king's courts of juſtice (*a*), and are authentic beyond all manner of contradiction. But as theſe are placed in public depoſitaries from which they cannot be delivered out, the copies of them are allowed as ſufficient evidence; but a copy of a copy is not evidence, for to that caſe the reaſon of neceſſity does not apply (*b*).

Acts of parliament, which are the firſt ſort of records, are either general or private. The firſt are defined to be ſuch as relate to the kingdom in general; and the ſecond, to the concerns of private

(*a*) This definition cannot be admitted to be very exact, for it is not every memorial of all the king's courts of juſtice, that is diſtinguiſhed by the name of a record; and there are other records beſides thoſe enumerated, ſuch as patents, and acts affecting the royal revenue.

(*b*) See ſome obſervations reſpecting the copy of a copy of a deed in the next ſection.

perſons; but many acts, private in their nature and operation, are expreſsly declared to be public, and in that caſe have for all technical purpoſes the ſame effect.

It is ſaid by *Gilbert*, "That of general acts of parliament, the printed ſtatute book is evidence, not that the printed ſtatutes are the perfect and authentic copies of the records themſelves, for there is no abſolute aſſurance of their exactneſs; but every perſon is ſuppoſed to apprehend and know the law which he is bound to obſerve, and therefore the printed ſtatutes are allowed to be evidence, becauſe they are hints to that which is ſuppoſed to be lodged in every man's mind already;" but this mode of ſtating the ſubject does not appear to be perfectly accurate; for the general law of the land is not in legal contemplation the ſubject of evidence (*a*), but of univerſal knowledge; and evidence relates to queſtions of fact, and not to points of general law. Private acts (which, as Mr. *Peake* judiciouſly obſerves, are not conſidered as laws but facts) muſt be proved like other records, which is done by proving examined copies. The printed copy of a private act of parliament is not in general good evidence, without being examined with the roll; but Mr. Juſtice *Buller* ſtates ſome caſes, which, on account of the notoriety of the ſubjects that they concern, appear to be conſidered as exceptions to the general rule; ſuch as the act for *Bedford Level*, for building *Tiverton*, &c. I think, however, that an exception of ſo vague a nature would now ſcarcely be allowed in practice.

The written laws of other countries, when they become material in the *Engliſh* courts, muſt be proved by examined copies; and this rule at common law applied to the ſtatutes of *Ireland*; but by Stat. 41 *Geo.* 3. *c.* 90. § 9. it is enacted, that the copy of the ſtatutes of *England*, before the union with *Scotland*, and of *Great Britain*, ſince publiſhed by the king's printer, ſhall be concluſive evidence of thoſe ſtatutes in *Ireland*, and the copy of ſtatutes paſſed in *Ireland* prior to the union, and publiſhed by the king's printer ſhall be concluſive evidence in *Great Britain*.

It is not my intention to enter into a diſcuſſion of the particular grounds which diſtinguiſh a public from a private act, or of queſtions reſpecting the caſes, where an act may or may not be given in evidence, without being ſpecially pleaded; I ſhall merely advert to an error of *Gilbert*, which is continued by Mr. Juſtice *Buller*, and is nearly allied to one already mentioned. Theſe eminent writers obſerve, that there are caſes in which both public and private acts muſt be pleaded, and that is when they make void ſolemnities; for in this caſe the conſtruction of the law is not

(*a*) See *poſt*, No. XVII.

that

that the ſolemn contracts ſhall be deemed perfect nullities, but that they are voidable by the parties prejudiced by ſuch contracts. But this ſtatement ſeems inaccurate; for although it may be neceſſary to plead ſpecially a matter of defence arising from a public ſtatute, that differs very materially from the pleading the exiſtence of the ſtatute itſelf, which is requiſite with reſpect to private ſtatutes, when they are the direct foundation of a claim or defence, and not merely evidence in ſupport of an iſſue upon facts otherwiſe ſufficiently alleged; whereas, every public ſtatute is judicially known, and it is only neceſſary to plead thoſe facts, which the ſtatute may render material. What is pleaded is not the ſtatute, but the application of it; ſuch ſpecial pleading is equally neceſſary, when a ſpecialty is to be avoided by matter of defence at common law, as fraud or force; but it was never ſaid to be neceſſary, that the common law allowing ſuch objections was to be alleged in pleading.

The records of courts of juſtice are concluſive evidence of the acts done by ſuch courts, ſo that no evidence can be offered, to ſhew that the deciſion of the court was otherwiſe, than ſuch as it appears by the record to be.

Thus, where a perſon not party to a former cauſe, (the verdict in which was offered as evidence againſt him,) endeavoured to ſhew that the finding of the jury in that cauſe was entered upon a particular iſſue by the miſtake of the officer, it was held, that as this evidence went to impeach the authenticity of the record, as to the fact of ſuch finding, it was not admiſſible. *Reed* v. *Jackſon*, 1 *Eaſt*, 355.

How far a perſon, not party to a former proceeding, is affected by what paſſed thereon, is a ſubject of diſtinct conſideration, which will be adverted to in another place.

But although it cannot be a matter of examination, whether a judicial act or proceeding was different from what it appears by the record to be, the record is not concluſive evidence, with regard to the facts expreſſed in it, except ſo far as the truth of ſuch facts is neceſſarily imported, in an admiſſion of the accuracy of record itſelf. For inſtance, a record of the conviction of an offender, is deemed concluſive as to the commiſſion of the offence; but as the time ſpecified in the indictment is not of the eſſence of the charge, it may be falſified by evidence. 2 *Hawk. P. C. c.* 15. (of avoiding judgment), *ſ.* 2.

So a judgment in ejectment is concluſive evidence in an action for meſne profits of the plaintiff's title, at the time ſtated in the demiſe; but as to the length of time that the defendant has occupied, it proves nothing. *Aſſen* v. *Parkin*, 2 *Bur.* 665. Upon the

the ſame principle, the general relation which any act of a court of record has to the firſt day of the term may be corrected by evidence, where the juſtice of the caſe requires a diſtinction. Thus, if a cauſe of action has accrued ſubſequent to the beginning of the term, evidence may be given of the actual commencement of the action, being ſubſequent to the cauſe of it. *Morris* v. *Pugh*, 3 *Bur.* 1241. *Per* Lord *Mansfield*. "The bill by fiction of law relates to the firſt day of term; but fictions of law hold only in reſpect of the ends and purpoſes for which they were invented; and when they are urged to an intent and purpoſe, not within the reaſon and policy of the fiction, the other party may ſhew the truth." But fictions are not allowed to be contradicted, ſo as to defeat the purpoſe for which they were introduced.

An officer whoſe buſineſs it is to keep the records, may be examined as to the ſtate and condition of them, but not as to the matter of the record. *Leighton* v. *Leighton*, 1 *Str.* 210. And if words have been ſtruck out ſo as to render a record erroneous, witneſſes may be examined, to ſhew ſuch words were improperly ſtruck out; but not to falſify the record, by ſhewing that an alteration, whereby the record was made correct, was improperly made. *Dickſon* v. *Fiſher*, 1 *Bl.* 664. 4 *Burr.* 2267.

There are various modes of authenticating the copies of records, as under the broad ſeal, or the ſeal of a court; and of copies not under ſeal, there are office copies, and ſworn copies; the former of theſe are deemed authentic, when made by an officer truſted to that purpoſe; but a copy made out by an officer who is not ſo intruſted, is merely as the act of a private man, and is no evidence; but the more particular expoſition of theſe diſtinctions, which I could merely tranſcribe from *Gilbert*, and *Buller*, would exceed the purpoſe of the preſent examination.

Next to records are the proceedings of the Courts of Chancery, and other courts not of record, of which copies are alſo allowed to be given in evidence, becauſe as theſe matters lie for the public ſatisfaction, every man has a right to their evidence, and they cannot be in ſeveral places at the ſame time. The journals of the Houſe of Commons are alſo acts of a public nature which are not records. Mr. *Douglas*, in his report of the trial of Lord *George Gordon*, after mentioning that ſworn copies of certain entries in the journals of the Houſe of Commons were produced and read in evidence without being objected to, ſubjoins a note in which he ſays, that he therefore preſumes that ſworn copies of the journals of parliament are clearly evidence, though he has known it diſputed, that it is a general notion that copies of nothing but records are admiſſable, if the original exiſts. He mentions a caſe in which

which an application was made for the *Eaſt India* Company, to produce their books, on the ground that copies from them could not be read. But the Court of King's Bench denied that to be the rule, and mentioned ſeveral caſes where matters not of record were admiſſable; as copies of court rolls, of pariſh regiſters, &c. And Lord *Mansfield* expreſsly ſaid, that the copies of the journals of the Houſe of Commons were evidence; and that he remembered a caſe in which the Speaker of the Houſe of Commons made a point that the copies ſhould be offered in evidence. The court added, that the reaſon founded upon inconvenience for holding it not neceſſary to produce records, applied with ſtill greater force as to ſuch public books, as the transfer books of the *Eaſt India* Company; for the utmoſt confuſion would enſue, if they could be tranſported to any the moſt diſtant parts of the kingdom, whenever their contents ſhould be thought material on the trial of a cauſe. Mr. *Douglas*, therefore, infers the correct principle to be as laid down by Lord *Holt*, that whenever an original is of a public nature, and would be evidence if produced, an immediate ſworn copy would be evidence. *Doug.* 590.

With reſpect to different matters of evidence falling under this claſs, the firſt ſubject which occurs is bills in chancery; which, according to *Gilbert*, are evidence when any proceedings have enſued thereon, but not otherwiſe; and, according to Mr. Juſtice *Buller*, are evidence in reſpect to the fact, upon which a party grounds his prayer of relief; but it is properly ſettled by modern determinations, that they are nowiſe evidence to the truth of their contents, being no more than the mere ſurmiſes of counſel. A bill is fictitious, it does not aver facts but ſuggeſts them, and calls for anſwers to aſcertain them; it may be withdrawn or amended, and decides nothing. *Vi. Fitz.* 296. *Allan* v. *Hartley*, *Cooke's*, *B. Law* 1. *Doe* v. *Sybourn*, 7. *T. R.* 2. Except in ſome caſes, which, in various other reſpects, admit of a greater latitude in evidence than accords with the general rule of law; as upon queſtions of pedigrees, (7 *T. R.* 2.) they are in general no further evidence, than to ſhew that ſuch a bill did exiſt, and that the facts were in diſpute in order to let in evidence of the other proceedings.

An anſwer in Chancery which is upon oath, and upon which it is preſumed that a man ſpeaks upon deliberation, is evidence againſt the perſon making it; but the anſwer of a guardian is no evidence againſt his ward, nor that of a truſtee againſt the perſon beneficially intereſted in the truſt. *Gilb.* 50. 1 *Keble.* 281. It has alſo been held that the anſwer of the alienor of an eſtate is no evidence againſt his alienee. 1 *Salk.* 286. But there is a contrary determination which is much ſtronger the other way; for the anſwer

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of a perſon ſetting forth the tenor of a deed being offered in evidence, upon the trial of an ejectment, it was objected by the defendants, that as they had been in poſſeſſion twenty years, the credit of that poſſeſſion was ſufficient evidence for them *primâ facie*, ſo as they ſhould not be compelled to ſhew their title, and therefore the anſwer ſhould not be read againſt them, until the plaintiff proved that they derived their title under the perſon making it. But the plaintiff proving conſtant reputation in the country, that the lands belonged to that perſon, the court permitted her anſwer to be read againſt them, unleſs they ſhewed another title from a ſtranger. Earl of *Suſſex* v. *Temple*, 1 Lord *Raym.* 310. There appears to be a ſubſtantial difference between ſuch an anſwer (or any other declaration) made before and after the alienation, for a perſon whoſe title is already affected by the admiſſion, ſhould not be allowed by alienation, to transfer a greater right to another than belonged to himſelf; and on the other hand, a party who has acquired an actual title, ought not to be prejudiced by the ſubſequent acts of the perſon from whom it was acquired, and who has become a ſtranger to the property. I alſo conceive that the reputation of the country was an inſufficient ground for admitting the declaration of the perſon, ſuppoſed to be the former proprietor; it being incumbent upon A., who founds his claim againſt B., upon the declaration of C., to make out the fact, by which ſuch declaration could be allowed to have any effect. I ſhould think it probable in the particular caſe, that there was ſome evidence of actual poſſeſſion, which *primâ facie* would be ſufficient. An anſwer in Chancery is evidence againſt the party making it, of the truth of the facts which it contains, and an examined copy of ſuch anſwer is allowed as evidence in all caſes, except upon an indictment for perjury.

With reſpect to the party whoſe anſwer is adduced, having a right to inſiſt upon the whole being taken together, provided it is relied upon at all, a diſtinction muſt be taken (which, although not declared in the authorities upon the ſubject, is to be collected from them, and is founded upon accurate principles) between its being part of the proceedings in the very ſuit depending, or being merely matter of evidence in a different cauſe.

In a ſuit in Chancery, the defendant by his anſwer, which was put in iſſue by the plaintiff's replication, admitted as executor that the teſtator had left 1100*l.* in his hands, and ſaid, that afterwards he gave a bond for 1000*l.*, and the teſtator gave him the other 100*l.*; as there was no evidence, but the defendant's own admiſſion for the receipt, it was contended that he ought to find credit when he ſwears in his own diſcharge. But it was anſwered, and re-

ſolved by the court, that when an anſwer was put in iſſue, what was confeſſed and admitted need not be proved; but it behoved the defendant to make out by proof, what was inſiſted upon by way of avoidance; but this was held under this diſtinction, where the defendant admitted a fact, and inſiſted upon a diſtinct fact by way of avoidance, there he ought to prove the matter of his defence, becauſe it may be probable that he admitted it out of the apprehenſion that it might be proved, and therefore ſuch admittance ought not to profit him, ſo far as to paſs for truth whatever he ſays in avoidance; but if it had been one fact, as if the defendant had ſaid, that the teſtator had given him 100*l.*, it ought to have been allowed unleſs diſproved, becauſe nothing of the fact charged is admitted, and the plaintiff may diſprove the whole fact as ſworn, if he can do it. *Gilb.* 51.

Now it muſt be remembered that the above deciſion is principally referable to the courſe of proceeding in courts of equity. A bill is filed, an anſwer is put in, the plaintiff either ſets down the cauſe for hearing upon bill and anſwer, which is an admiſſion of the *truth* of the whole, and merely brings the *ſufficiency* of it into conteſt; or he replies to the anſwer, putting the whole in iſſue generally, whereupon the defendant muſt ſubſtantiate by proof, all the facts upon which he means to inſiſt, whilſt the plaintiff may rely upon every fact admitted, which he conceives to be material, without being bound to the admiſſion of any others. Upon this proceeding no queſtions of credit, no inferences of fact, can regularly occur; there are certain general rules reſpecting what ſhall be taken as true, in the admiſſions and teſtimony, and if a real diſputable queſtion occurs reſpecting a matter of fact, it is referred to the examination of another tribunal.

But where an anſwer is adduced as evidence in a court of law, no part of it is immediately in iſſue, neither does it form any direct proceeding in the cauſe. It is only one amongſt other *media* for the inveſtigation of truth. And if one ſide introduces it at all, the other may inſiſt upon the whole being read, in order that a judgment may be formed upon its entire credit and effect (*a*). But though the

(*a*) Mr. *Peake* having cited the preceding caſe at length, obſerves that no other better ſhews the diſtinction between the rules of evidence, in the common law courts and thoſe poſſeſſing an equitable juriſdiction. In a court of law it would have been ſaid, "that if a man was ſo honeſt as to charge himſelf, when he might roundly have denied it, and no teſtimony could have appeared, he ought to obtain credit when he ſwears in his own diſcharge." He adds, that his habits of thinking and legal notions having been formed in courts of law, might perhaps have given him an unfair prejudice in favour of their rules; but that to him they appear, in this particular at leaſt, moſt conſonant to reaſon and juſtice.

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the whole must be read, it does not necessarily follow that it must be wholly admitted as true, or wholly rejected as false; the credit and effect of any part of it is to be considered by the jury, (the constitutional judges upon questions of fact,) according to the general impression of their minds, derived from the general consistency of the answer in itself, or the light which may be thrown upon it by other evidence. This was collaterally stated by Lord *Mansfield*, in observing upon the argument which had been advanced respecting the credit of a witness, that as the case rested entirely on his evidence, you must take it altogether and believe the whole; but although, said his lordship, the whole of an affidavit or answer must be *read*, if any part is, yet you need not *believe* the whole equally. You may believe what makes against his point who swears, without believing what makes for it. *Bermon* v. *Woodbridge*, *Doug.* 788.

Mr. Justice *Buller* mentions a case which seems to furnish a proper exception to the rule, that the whole must be even read if any part is; viz. where the answer in Chancery, of a person who swore that he had an annuity, was read in order to prevent his being examined, as the answer was only produced to shew that he was not a competent witness in the cause, and not to prove the issue.

The preceding observations respecting the reading of the whole of an answer, without being obliged to give credit to every part, are equally applicable to every other kind of evidence. A man's own admissions and representations shall be allowed as evidence against him, but he shall not be subjected to having one part of the same act considered without the other; nor shall the mere reliance upon his act, for the admission of any one circumstance, be considered as concluding in his favour, every other circumstance which he has chosen to introduce.

The rule mentioned by *Gilbert*, where the whole constitutes one fact, is founded upon the most evident principles of justice. Although relying upon the admission of one fact, shall not conclusively establish the assertion of another; the representation of one and the same fact must not be garbled and distorted.

The depositions of witnesses, or the verdict upon a former trial, with evidence of what the witnesses swore, is classed as written evidence. But as such testimony in respect of the facts is originally

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If my ideas upon the general subject are correct, the distinction in this matter is not between courts of law and of equity, but between pleadings and evidence; and that if an answer in Chancery was introduced incidentally, and merely by way of evidence in a court of equity, it ought to be treated precisely in the same manner as in a court of law. On the other hand, it is very clear that if in a court of law, a plea confesses the matter in demand, but avoids it by other circumstances, the proof of the avoidance is incumbent on the defendant.

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oral, and the diſtinctions reſpecting it regard the caſes in which ſuch minutes of oral teſtimony may be allowed or not, I ſhall poſtpone any reference to thoſe ſubjects, until I come to the diſcuſſion of parol evidence.

The proceedings of all courts not of record, come under this ſecondary diviſion of public evidence, conſiſting of matters inferior to record; and it may be ſtated generally that ſuch proceedings are the proper evidence of matters within the juriſdiction of thoſe courts. The effect of judicial proceedings, in whatever courts, will be particularly attended to hereafter. The effect of proceedings in foreign courts will alſo be a matter for future examination. It will however here be proper to obſerve, that the proceedings of courts of record in the Colonies, *Walker* v. *Witter*, *Doug.* 1. and, I conceive alſo, courts in *Ireland*, have not in *England* the ſame authority with thoſe of courts of record within the realm, but are, like the proceedings of our own inferior courts, ſubject to examination.

In a late caſe, it was decided that a judgment of a Court of *Grenada* was not ſufficiently proved by evidence of the handwriting of the judge, without alſo proving that the ſeal affixed was the ſeal of the iſland. *Henry* v. *Arley*, 3 *Eaſt*, 221. A former caſe was relied upon, in which it was held neceſſary to prove, that the ſeal of a *Scotch* diploma was the proper ſeal of the univerſity. *Moiſes* v. *Thornton*, 8 *T. R.* 303.

The pariſh regiſter, or a copy of it, is good evidence, and proof *viva voce* of the contents of the regiſter, without a copy has been admitted; but Mr. Juſtice *Buller* obſerves, that the propriety of ſuch evidence may well be doubted, becauſe it is not the beſt evidence the nature of the thing is capable of. In a queſtion reſpecting the plaintiff's legitimacy, he produced the general regiſter of the pariſh wherein he was entered, as the ſon of his father and mother, in the ſame manner as lawful children are entered. This regiſter, the clerk ſaid, was a book into which the entries were made once in three months, out of the day-book wherein the entries were made, immediately after the chriſtening, or next morning. To encounter this, the defendants aſked him if any notice was taken of baſtards, and he ſaid their method to add B. B. which ſtood for baſe born; and then they offered the day-book from which the other entry was poſted, and in which B. B. was inſerted, and inſiſted that it was the original entry, and this being oppoſed the opinion of the court was taken. Mr. Juſtice *Page* was for allowing it to be read, but the other two judges were againſt it, ſaying, that the other was the only regiſter, and there could not be two regiſters in one pariſh, ſo the day-book was rejected. *May* v. *May*,

May, Str. 1072. The propriety of this deciſion may perhaps be open to conteſt, for though the entry in the regiſter was evidence, it was not concluſive evidence of the point in queſtion, like a record or the probate of a will. In queſtions of pedigree, (as will be ſeen in the ſequel,) entries of various kinds are allowed, which in other caſes are not admiſſable, and the day-book was at leaſt equivalent to any private entry. The event of the particular cauſe had probably ſome effect on the minds of the judges, who might have revolted at the deciſion, if the circumſtances had been reverſed; if the general regiſter purported that the party had been illegitimate, and the day-book from which an incorrect tranſcript was made had evinced the contrary; but no legal diſtinction can be allowed between the two caſes.

In an action for adultery, (upon which an actual marriage muſt be proved,) it was ruled by Mr. Juſtice *Blackſtone*, that the evidence of the miniſter, or ſubſcribing witneſſes to the regiſter, was neceſſary to prove the identity of the parties married, as being the beſt proof that could be given; but that opinion was over-ruled by the Court of King's Bench, who held that whatever was ſufficient to ſatisfy a jury was good evidence; and Mr. Juſtice *Buller* obſerved, that the original regiſter was not neceſſary to be produced, and it is only where that is required that ſubſcribing witneſſes muſt be called. *Birt* v. *Barlow, Doug.* 171.

Concerning other pieces of public evidence, I ſhall extract the following paſſages from *Gilbert*, ſubjoining the notes which I formerly prepared, with the deſign of ſubmitting them to the public in an edition of that work.

"The pope's licence, without the king's, has been held good evidence of an impropriation, becauſe anciently the pope was held to be the ſupreme head of the church, and therefore, the pope was held to have a diſpoſition of all ſpiritual benefices, with the concurrence of the patron, without any leave of the prince of the country; and theſe ancient matters muſt be admitted, according to the error of the times in which they were tranſacted. A pope's bull is no evidence on a general preſcription to be diſcharged of tithes, becauſe that ſhews the commencement of ſuch a cuſtom, and a general preſcription ſhews, that there was no time or memory of things to the contrary, ſo that the bull doth itſelf contradict ſuch preſcription. But the pope's bull is evidence on a ſpiritual preſcription, when you only ſay the lands belonged to ſuch a monaſtery as was diſcharged of tithe at the time of the diſſolution, for then they continue diſcharged by act of parliament.

If the queſtion be, whether a certain manor be ancient demeſne, or not, the trial ſhall be by domeſday-book, which ſhall be inſpected by

by the court. Ancient demeſnes are the ſocage tenures, that were in the hands of *Edward* the Confeſſor, and which *William* the Conqueror, in honour of him, endowed with certain privileges. Domeſday-book was a terrier or ſurvey of the king's lands, which was made in the time of the Conqueror, and which aſcertains the particular lands which had this privilege.

In ejectment for the manor of *Artam*, the defendant pleaded ancient demeſne; and when Domeſday-book was brought into court, would have proved that it was anciently called *Nettam*, and that *Nettam* appears by the book to be ancient demeſne; but he was not permitted to give ſuch evidence, for if the name be varied it ought to be averred in the record. *Gregory* v. *Wilkes*, *H.* 28. *Ch.* 2. *B. N. P.*

I, however, conceive that this evidence was properly referable to the iſſue on the record, and that it was not neceſſary to put in iſſue the former name of the manor. If an individual, whoſe name has been changed by the king's authority, is ſued in his preſent name for money lent, it cannot be contended that a promiſſory note ſigned in his former name would be inadmiſſable evidence.

An old terrier or ſurvey of a manor, whether eccleſiaſtical or temporal, may be given in evidence: for there can be no other way of aſcertaining old tenures or boundaries.

A terrier or glebe is not evidence for the parſon, unleſs ſigned by the church-wardens, as well as the parſon; nor then neither, if they be of his nomination, and though it be ſigned by them, yet it ſeems to deſerve very little credit, unleſs it be likewiſe ſigned by the ſubſtantial inhabitants; but in all caſes it is ſtrong evidence againſt the parſon. *B. N. P.*

An old map of lands was allowed as evidence (*a*), where it came along with the writings, and agreed with the boundaries adjuſted, in an ancient purchaſe.

It was ruled by Lord Ch. J. *Holt*, *Warw.* Sum. aſſizes, 1699, that if *A.* be ſeiſed of the manors of *B.* and *C.*, and during his ſeiſin of both, he cauſes a ſurvey to be taken of the manor of B., and afterwards the manor of *B.* is conveyed to *E.*, and after a long time there are diſputes between the lords of the manors of *B.* and *C.*, about their boundaries; this old ſurvey may be given in evidence, *contra*, if the two manors had not been in the hands of the ſame perſon, at the time of the ſurvey taken. *Bridgeman* v. *Jennings*, 1 Lord *Raym.* 704. But it was held at *Exeter* Sum. aſſ. 1719, that ſurvey books of a manor which were ancient, unleſs ſigned by the

(*a*) This is not very correctly arranged as public evidence, but I have not conſidered that as a matter of ſufficient importance to require its tranſpoſition, eſpecially as the ſubject has a connection with thoſe which accompany it.

tenants, or they appear to be made at a court of ſurvey, are no evidence; they are elſe only private memorials. 12 *Vin. Abr.* 90. *fol.* 12. A ſurvey taken by one under whom the plaintiff claimed, was alſo rejected as evidence for the plaintiff. *Anon. Str.* 95. *Vi. Bull. N. P. Tit. Ev.*

An ancient ſurvey from the firſt fruits office, of the poſſeſſions of a nunnery to which a rectory was appropriated, taken upon the diſſolution of monaſteries, by which it appeared what ſpecies of tithes belonged to the rector and what to the vicar, and a ſimilar ſurvey taken 35 *Eliz.* were allowed as proper evidence, though it did not appear by what authority the laſt ſurvey was taken. *Vicar of Kellington* v. *Trincoll*, 1 *Wilſ.* 170. In *Denn* on the demiſe of *Godwin* againſt *Spray*, 1 *T. R.* 466, a parchment writing, tranſmitted from one ſteward of a manor to another without a date, by which "*de conſilio domini regis ex aſſenſu omnium ſummonitorum manerii dicti domini regis de* B. *de modo tenuræ ſuæ ad ſpecialem rogatum inſcriptis expreſſe ordinatum eſt*," &c. ſpecifying the courſe of deſcent within the manor, was ruled to be good evidence, though it was not properly a court roll. In *Roe ex dem. Beebee* v. *Parker*, 5 *T. R.* 26, the preſentment of the homage at a court baron of the mode of deſcent was held to be full evidence of the cuſtom, and an objection that it was inſufficient without inſtances being ſhewn, was over-ruled. Where there was an admittance of a perſon, as *youngeſt* nephew in 1657, on the one ſide, and on the other a preſentment in 1692, that the cuſtom of deſcent extended only to the youngeſt ſon, and if no ſon, to the youngeſt brother, and went no further; and there was parol evidence of that being the repute, the jury found according to the admittance, and the court refuſed to grant a new trial. *Doe dem. Maſon* v. *Maſon*, 3 *Wilſ.* 63.

Corporation books are generally allowed to be given in evidence, when they have been publicly kept as ſuch, and the entries made by the proper officer, not but that entries made by other perſons may be good, if the town clerk is ſick or refuſes to attend, but then that muſt be made to appear. Whoever produces a book muſt eſtabliſh it before he delivers it in. *Per Cur. Rex* v. *Matherſell*, 1 *Str.* 92. In that caſe, a book which appeared to have been only minutes of ſome corporate acts ten years ago, all written by the proſecutor's clerk, who was no officer of the corporation, was held to have been properly rejected. Evidence being given of orders in the corporation books, for diſfranchiſing certain perſons, it was ruled that orders in the ſame books, by which they appeared to have been reſtored by virtue of peremptory writs of *mandamus*, were admiſſable, though the writs themſelves were not produced. *Symmers* v. *Regem*, *Cowp.* 489.

Rolls

Rolls or ancient books, in the heralds' office, are evidence to prove a pedigree, but an extract of a pedigree taken out of records ſhall not be received; becauſe ſuch extract is not the beſt evidence in the nature of the thing, as a copy of ſuch records might be had. 2 *Jones*, 224. *Bull. N. P.* 248. A viſitation made by the heralds entered in their books and kept in their office, and the minute book of a former viſitation, ſigned by the heads of the ſeveral families, and found in the library of Lord *Oxford*, were admitted. *Pitton* v. *Walter*, *Str.* 161. *Camden's Britannia* was held not to be evidence, to prove whether by the cuſtom of *Droitwich* ſalt pits could be ſunk in any part of the town, or in a certain place only; but a general hiſtory may be given in evidence, to prove a matter relating to the kingdom in general, as in the caſe of *Neale* and *Fry*; chronicles were admitted to ſhew that king *Philip* did not take the ſtyle mentioned in a deed as king of *Spain*, at the time it purported to bear date; *Charles* V. not having then ſurrendered (*a*). *Dugdale's Monaſticon* was refuſed for evidence, whether *A.* was an inferior abbey or not, becauſe the original records might be had in the augmentation office.

The regiſter of the Navy Office, with proof of the method there uſed, to return all perſons dead, with the letters D—d, is ſufficient evidence of a death. *Ex dem. Whitcombe, E.* 6 *Ann.* c. 13. *B. N. P.* 249. An inventory taken by a ſheriff was admitted as evidence between ſtrangers, to prove the quantity and value of the goods; for the law intruſting the ſheriff with the execution muſt intruſt him throughout. 2 *Keb.* 277.

A copy of the biſhop's inſtitution book is not ſufficient evidence to prove a preſentation, for the preſentation itſelf ſhould be produced, or it ſhould be ſhewn that it had been properly ſearched for and could not be found, and the inſtitution book itſelf might have been produced. *Tillard* v. *Shebbeare*, 2 *Wilſ.* 266.

A certificate from the ſecretary at war, of the nature of a ſerjeant's ſtation, though oppoſed, was allowed to be read in evidence to the court, upon an application for the defendant's diſcharge as being a ſoldier. *Lloyd* v. *Woodall*, 1 *Bl. Rep.* 29.

The king's ſign manual, declaring his intention to pardon a ſentence of tranſportation, and inſert the priſoner's name in the next general pardon, is evidence on an indictment for being at large after having been ordered for tranſportation. *Rex* v. *Miller*, 2 *Bl. Rep.* 797.

The Gazette is evidence of the king's proclamation, and of addreſſes made to him. *Rex* v. *Holt*, *T. R.* 436. The copy printed by the king's printer is evidence of the articles of war. *Rex* v. *Withers*, cited, *ibid.*

(*a*) *Vi.* Mr. *Peake's* obſervations upon this ſubject, Law of Evidence.

SECTION V.

Of Deeds.

Private writings are divided into deeds, and writings of an inferior nature. The great diſtinction between them is, that deeds, *proprio vigore*, conſtitute and create an immediate obligation or releaſe, whereas other writings are only a mode of evidence. An effect of this diſtinction was formerly adverted to, in examining the nature of the conſideration requiſite to ſupport an obligatory promiſe; and it was ſhewn that an engagement by deed is in its own nature valid and obligatory, and does not require the exiſtence of ſuch a conſideration, as is abſolutely requiſite to render a verbal engagement, or an engagement by writing inferior to a deed, efficacious. Upon the ſame principle, the diſcharge of an obligation by an ordinary writing is of no legal efficacy, merely conſidered in itſelf: a receipt for a ſum of money is only evidence of the act of payment; it is open to contradiction by oppoſite evidence, that the payment did not take place, and has no immediate intrinſic operation in producing a diſcharge; whereas a releaſe by deed deſtroys and annuls the obligation, and is perfectly independent of every extrinſic circumſtance. An obligation contracted by deed is analogous to the *Roman* ſtipulation, as was ſhewn in a former number of the Appendix already alluded to; and the diſcharge of an obligation by releaſe is, in the ſame manner, analagous to an acceptilation; the nature of which is explained in a note to No. 571. of the preceding treatiſe.

The effect of an engagement by deed is of conſiderable importance, in the event of the death of the debtor, on account of its being a charge upon real eſtate; which a verbal engagement, or an engagement by any inferior writing, is not, and alſo on account of its having a priority in the application of the perſonal eſtate.

In caſe a deed is entered into, engaging, for the performance of a preceding obligation by the ſame perſon, the inferior obligation is merged in the higher efficacy of the deed, which becomes the only effectual title. But a deed given by another perſon, as a collateral ſecurity, does not affect the validity of the previous engagement. *White* v. *Cuyler*, 6 *T. R.* 176.

In the ſame caſe it was held that an inſtrument purporting to be a deed, executed by a married woman without her huſband, and therefore void, did not deprive the other party of the right which he had againſt the huſband, as upon a parol contract; and in *Lowe* v. *Peers*, 4 *Bur.* 2225, in which a man gave a woman an engagement by deed, to pay her 1000*l.* if he married any other perſon, which

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engagement was held to be illegal: Lord *Mansfield* ſaid, that if there was really any mutual contract under fair and equitable circumſtances, the plaintiff would ſtill be at liberty to bring her action, for the void bond could never be in her way.

The general definition of a deed is an act in writing, ſealed (*a*) and delivered. In the earlier periods of our judicial hiſtory, the art of writing was very far from being generally diffuſed, and hence aroſe the circumſtance that the acts of individuals were rather ratified by appropriate ſeals, than by written ſignatures; accordingly a ſeal became the ſolemn mark of a legal obligation, and contracts or acts of liberation, as already obſerved, derived no additional legal efficacy from merely being reduced into writing. It does not ſeem that any particular manner or form of words are requiſite to conſtitute the ſealing and delivery of a deed. I conceive it to be ſufficient, that the ſeal ſhould be aſſented to as that of the party, and that he ſhould in any manner teſtify his intention of delivering the inſtrument as his deed, having it in his preſence. In one caſe, the laſt mentioned circumſtance ſeems to have been conſidered as unneceſſary. In this caſe a wife joined with her huſband, in executing a mortgage of her eſtate which was void. After his death ſhe did ſeveral acts confirmatory of the tranſaction, which, Lord *Mansfield* ſaid, was a clear acknowledgment that the deed was hers, and that ſhe was content that the parties ſhould enjoy according to the terms of the deed. *Goodright dem Carter* v. *Strahans, Cowp.* 201.

I have in a former publication intimated my idea, that in that caſe a diſpoſition to effectuate the moral juſtice of the caſe between the parties is more conſpicuous, than a conformity to the principles upon which it ought to have been decided as a mere queſtion of law; and that at leaſt it ought to have been left to the deciſion of the jury, whether any of the exiſting circumſtances were intended as an execution, or whether they were not the conſequence of an apprehenſion, that a valid deed already exiſted.

(*a*) In *Adam* v. *Kerr*, 1 *Bof.* 360, an inſtrument executed in *Jamaica*, and declared upon as a deed appeared to have no ſeal, though a mark of a particular kind had been made with a pen, in the place where deeds are uſually ſealed; and it became a queſtion whether evidence was admiſſible, of a cuſtom in *Jamaica* to execute bonds in this manner. The opinion of the court appears to have been in favour of ſuch evidence, but the point was not judicially decided. In the caſe in *Carolina*, cited in a former ſection, it is ſaid, the people began at length to forget the original uſe of the inſtitution of ſeals, and to ſeal with any impreſſion they could get; and the law rather than invalidate the whole tranſaction, left it to the jury to decide whether that was the ſeal of the party or not. In this country the people have departed ſtill further from the uſe of ſeals, by not making any impreſſion at all, ſcratching ſomething like a ſeal upon the margin of the paper, and making that paſs for a ſeal.

In the case of *Ball* v. *Dunsterville & al*r. 4 *T. R.* 313, it appeared that one of two partners, in the presence of the other, executed a deed for them both; there was but one seal, and it did not appear that he had put the seal twice upon the wax; and the court were of opinion that it was a good deed, that no particular mode of delivery was necessary, for that it was sufficient if a party executing a deed treated it as his own; and they relied principally on this deed having been executed by the one for himself, and the other in the presence of that other.

It has been a matter of dispute, whether the appellation of a deed was referable only to contracts, or extended to other sealed instruments; for instance, awards when they happened to be under seal; and consequently whether it was requisite for such instruments to have the stamp imposed upon deeds. Mr. Justice *Lawrence*, in a late case, mentioned, that the question had, with respect to awards, been agitated several times; but he thought the final determination was, that if the arbitrator delivers an award under seal as a deed, it must then have a deed stamp, but although it were by a writing under seal, yet if it were not delivered as a deed, it was sufficient if it had an award stamp. *Brown* v. *Vawser*, 4 *East*, 384.

At common law the signature of the party certainly was not essential to a deed; but it is the opinion of many great authorities that it has been rendered so, by the statute of frauds. As the practice of signing deeds is universal, the discussion of that question cannot be of much importance; but it seems to be extraordinary that it should be supposed, that the statute has introduced any alterations, with regard to the general question, as all the provisions of it are merely applicable to particular subjects, and there are many deeds with which those subjects have not any kind of connection. With regard to the disposition of landed property, a writing signed by the party is expressly required.

The act of an agent, with respect to the object of his authority, is in general regarded as the act of the principal; but no person can be liable to the obligation arising from a deed, unless it is either executed by himself, (in which expression I include the acts above referred to, as amounting to an execution,) or unless the authority is given by another deed, so that the act is ultimately founded upon his own sealing and delivery. Accordingly, it has been ruled that one partner in trade, whose general authority is more extensive than that of an agent, cannot bind another by his execution of a deed. *Harrison* v. *Jackson*, 7 *T. R.* 207.

Where a person is empowered, by a letter of attorney from another, to execute a deed, or do any other act for him, it must be done

done as the act of the party himself, and not as the act of the attorney; but the particular mode and form of doing the act is not material. Therefore, when the attorney *Wilks* signed for *J. Brown, M. Wilks*, it was held to be a good execution of the deed, as the deed of *Brown*. See *Wilks* v. *Back*, 2 *East*, 142, and the authorities there referred to.

Where a deed is absolutely void in its execution, subsequent delivery may make it good as a deed then first executed. Such, for instance, is the deed of a married woman, which is void in respect of her legal disability to contract, but may be rendered valid by her sealing and delivery after she becomes a widow. But if the deed is only such as may be avoided, by persons for whose protection the law has introduced particular exceptions, the whole effect is derived from the first execution, and cannot be varied by any subsequent delivery. Subsequent acts may amount to a confirmation, but cannot operate as an execution of the deed. See *Perkins*, §. 154. *Zouch* v. *Parsons*, 3 *Bur.* 1794. *Goodright* v. *Strahan*, *Cowp.* 201.

The books on the law of evidence contain much learning, upon the subject of its being necessary upon pleading a deed, to produce it to the court, (or, in the language of the law, to make a profert of it,) and upon the distinctions in that respect, resulting from the different nature of the deeds alleged, upon the situation of the parties making the allegation, and upon their being the foundation of a claim or defence, or merely incidental. I have all along declined entering into discussions, which are confined to the rules of special pleading, not by any means as under-rating the importance or excellence of that branch of our municipal jurisprudence, but as being foreign to my general purpose. I, therefore, shall only observe, that by modern determinations, the profert of deeds may be dispensed with, upon an allegation of their being lost by time, or accident, or cancelled, in consequence of which determination, a person is not by such an accidental loss deprived of his ordinary remedies by the common law, and compelled to resort to the assistance of a court of equity. *Read* v. *Brookman*, 3 *T. R.* 151. *Bolton* v. *Bish. of Carlisle*, 2 *H. B.* 259.

With respect to giving deeds in evidence; the first rule is, that the deed itself must be produced, unless a satisfactory excuse can be given. What shall amount to such excuse, may vary according to the numerous cases, between the proof of its being accidentally consumed by fire, and the simple allegation that it cannot be found.

In the case where it was held that the profert might be dispensed with, upon an allegation of the deed being lost by time, or accident, Lord *Kenyon*, truly said, there was no doubt but upon the

trial of a cauſe, depending upon the exiſtence of ſuch a deed, every proper ſuſpicion would be entertained. A mere excuſe hatched for the purpoſe would not be conſidered as a ſufficient apology for not producing the deed, nor indeed any excuſe, but ſuch as the juſtice and urgency of the caſe would warrant.

There is evidently in point of reaſon a diſtinction upon this head, between deeds which regularly ſhould be in the cuſtody of the perſon claiming the benefit of their contents, and thoſe which belonging to or being in the cuſtody of one perſon, are material to the intereſt of another. In the latter caſe, an application to the perſon to whom the poſſeſſion of the deeds properly belongs, and an inability on his part to find them, ought to be conſidered as ſufficient to warrant the admiſſion of ſecondary evidence; and ſuch is the practice upon the ſubject, for it would be unjuſt that one man ſhould ſuffer by the negligence of another, over whom he has no control.

The ſtrongeſt caſe for diſpenſing with the production of an exiſting writing is, when it is or ought to be in the hands of the adverſe party who upon notice refuſes to produce it.

There is a caſe reſpecting the non-production of a deed, which did not paſs without a difference of opinion, and which appears to be very fairly open to diſpute.

An ejectment was inſtituted upon the ſeveral titles of *Haldane* and *Urry*. Evidence being given of a title in *Haldane*, it appeared by the croſs-examination of one of the plaintiff's witneſſes, that *Haldane* had conveyed to *Urry* by a deed, which the plaintiff had in court, for the production of which no notice had been given, and which the counſel refuſed to produce.

This was held to defeat the title under *Haldane*, but not to ſet up the title under *Urry*, for that the refuſal to produce was ſufficient to let the defendant into parol evidence of *Haldane*'s eſtate being diveſted; but not to excuſe the plaintiff from ſhewing *Urry*'s eſtate by the beſt evidence. The refuſal to produce was regarded as a preſumption of ſomething fatal in the contents.

Mr. Juſtice *Yates* briefly intimated an oppoſite opinion, obſerving that the plaintiff's counſel were not obliged to produce this deed, that no man can be obliged to produce evidence againſt himſelf; and the only conſequence of notice to produce it would have been the admitting inferior evidence. *Roe* v. *Harvey*, 4 *Bur.* 2484. The deciſion would have been very proper, if it had related to two diſtinct pieces of evidence; if it had been proved by parol, that *Haldane* had conveyed it to a third perſon, that would not have authorized the plaintiff to prove, that that perſon had conveyed to *Urry*, except by the proper rules of evidence; but the fact that

Haldane had conveyed to *Urry*, was one entire propoſition, which ought to have been either adopted or rejected; and not from any diſapprobation of a party's conduct, or from any preſumption of an unknown ſomething, garbled and ſeparated.

Lord *Mansfield*, in the ſame caſe, obſerved, that in civil cauſes the court will force parties to produce evidence, which may weigh againſt themſelves, or leave the refuſal to do it after proper notice, as a ſtrong preſumption to the jury. But in a criminal or penal cauſe, the defendant is never forced to produce any evidence, though he ſhould hold it in his hands in court.

That a party ſhall be actually forced to produce the evidence, ſo as to be puniſhed for refuſal, is a propoſition totally unwarranted by authority, and I ſuppoſe that is not what was meant by the expreſſions above quoted, and what is ſaid reſpecting leaving the refuſal as a preſumption to the jury, ſhould it be received with conſiderable qualification; for it cannot be admitted that ſuch a preſumption ſhould ſtand inſtead of all other evidence, and ſupply the total deficiency of proof. It is only in weighing the effect and ſubſtance of evidence, in its nature adequate to the ſupport of a fact in queſtion, that the jury can take into conſideration the opportunity allowed to the oppoſite ſide of contradicting the evidence if falſe, or of deſtroying the inference from it, if erroneous, and thereby conclude that evidence, otherwiſe ſuſpicious, is true; or that an inference, otherwiſe ſlight and feeble, is correct (*a*).

The diſtinction betwen civil, and criminal, or penal caſes is expreſsly diſallowed, in the caſe of *The Attorney General* v. *Le Merchant*, 2 *T. R.* 201. *n.* where, upon an information in the exchequer, for forfeitures under a revenue act, the ſubject was elaborately and with much perſpicuity examined by the Lord Ch. Baron *Smyth*.

In a very late caſe it was decided, that if a deed is pleaded with a profert, nothing can diſpenſe with the production of the deed itſelf, as the deed is ſuppoſed to be in court at the time, and the party takes upon himſelf to aver the exiſtence. In the particular caſe the evidence ſhewed that the deed had been deſtroyed by the oppoſite party; and as that circumſtance would have been the moſt favourable ground of exception, it is the ſtrongeſt proof of the univerſality of the rule. *Smith* v. *Woodward*, 4 *Eaſt*, 585.

In caſe there appear to be ſufficient circumſtances to excuſe the production of the deed, the rule of evidence, as ſtated by Lord *Hard-*

(*a*) In a former publication I took occaſion to obſerve, with reference to this caſe, that the having an inſtrument in court may not always be ſufficient to countervail the inconvenience ariſing from a want of notice to produce it; becauſe, upon a notice, the party may come prepared with evidence, to repel the inferences that might ariſe againſt him, upon the mere production of the inſtrument called for.

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the defendant's cuſtody, he gives the defendant notice to produce it, and the deed, when produced, muſt *prima facie* be taken to be duly executed; becauſe the plaintiff, not knowing who are the ſubſcribing witneſſes, cannot come prepared at the trial to prove the execution of the deed. Therefore an inſtrument, coming out of the hands of the oppoſite party, muſt be taken to be proved. If indeed there be any fraud in the caſe, the other party will not be precluded from impeaching it. *Vi. Rex* v. *Inhab. of Middleſoy*, 2 *T. R.* 41. Mr. *Peake*, after quoting this caſe, ſays, that the rectitude of the deciſion, as extending to third perſons, into whoſe hands an indenture may fall, has been doubted by very high authority. There certainly is conſiderable difficulty on which ever ſide the point is decided, for the party requiring the production may be ignorant who are the ſubſcribing witneſſes. On the other hand, the accidental poſſeſſion of the inſtrument may be wholly unaccompanied by any knowledge of its authenticity; but I conceive that the purpoſes of juſtice will be more frequently anſwered by the admiſſion of this evidence, than by its rejection.

According to the opinion of Lord Chief Juſtice *Holt*, in an anonymous caſe, 12 *Mod.* 607. if it is proved that the witneſſes to a deed are dead, beyond the ſeas, or that a party has made ſtrict inquiry after them, and cannot hear of them, he ſhall be allowed to prove their hands. There are ſeveral caſes connected with this propoſition, which I think it material to notice.

In *Henley* v. *Phillips*, 2 *Atk.* 48. it is ſaid, that if witneſſes are dead who have atteſted a deed, it is not ſufficient that you prove the hand-writing, but you muſt likewiſe ſhew that they are dead. Where a perſon has lived abroad for ſome years, there muſt be ſtrict proof of his death; otherwiſe, where the witneſs has lived conſtantly in *England*, from the time of ſubſcribing his name to the day of his death, there a ſlight evidence of his death is ſufficient, eſpecially where the perſon who proves his hand-writing knew him intimately, and ſwears that he believes him dead; in ſuch a caſe, the court will not expect ſuch nicety as that a certificate of his death ſhould be produced. The diſtinction juſt ſtated appears to have no foundation in reaſon, and is ſo far from being conſonant to actual practice, that proof is admitted of the hand-writing of an atteſting witneſs who is alive, but out of the kingdom.

Where a ſubſcribing witneſs became the repreſentative of the creditor, proof of the hand-writing was admitted. *Godfrey* v. *Norris*, *Str.* 34. Alſo where the witneſs became the repreſentative of the debtor. *Anon.* cited, 1 *Wms.* 289. So where the witneſs had become blind. *Vi. Wood* v. *Drury*, 1 Lord *Raym.* 734. or was rendered incompetent

incompetent by being convicted of forgery. *Jones* v. *Maſon*, *Str.* 833.

In *Barues* v. *Trompowſky*, 7 *T. R.* 265, proof was given of the ſignature of the party to a writing, which appeared from the circumſtances to have been executed at *Riga*. There was evidence of there having been a perſon at *Riga*, of the name of the atteſting witneſs, but no proof of his hand-writing; and this was ruled to be inſufficient. Lord *Kenyon* (ſtopping the counſel) ſaid, "We ought not to ſuffer this point to be called in queſtion; it is too clear for diſcuſſion. I do not ſay, that proof of the hand-writing of the contracting party is not under any circumſtances ſufficient, where there is a ſubſcribing witneſs, as if no intelligence can be obtained reſpecting the ſubſcribing witneſs, after reaſonable inquiry has been made; but here the witneſs is a known perſon reſiding at *Riga*. Generally ſpeaking, every inſtrument, whether under ſeal or not, the execution of which is witneſſed, muſt be proved in the ſame manner, regularly by the witneſs himſelf if living, if dead, by proving his hand-writing, if abroad by ſending out a commiſſion to examine him, or at leaſt by proving his hand-writing, which laſt indeed is a relaxation of the old rules and admitted only of late years. I remember a caſe alluded to, in the argument of counſel which was tried at *Guildhall*, where the ſubſcribing witneſs having been domiciled in a foreign country, Lord *Mansfield* admitted evidence to be given of his hand-writing. The opinion was adopted with approbation at the time, on account of the neceſſity and convenience of the caſe, and I myſelf have adopted it in caſes which have been tried before me. The ſame medium of proof has alſo been admitted, in caſes where the ſubſcribing witneſs has been ſought for and could not be found, ſo as to furniſh a preſumption that he was dead. But the rule has never been relaxed further than theſe inſtances, and there is neither neceſſity nor convenience in doing ſo."

In *Adam* v. *Kerr*, 1 *Boſ.* & *P.* 360, a bond was executed in *Jamaica*; one of the atteſting witneſſes was dead, and his hand-writing was proved; the court were of opinion that this was ſufficient proof of the execution, without proving the hand-writing of the other, who was reſident abroad, or of the obligor. In *Cunliffe* v. *Seſton*, 2 *Eaſt*, 183, a bond appeared to be atteſted by one *Bate*, and by *Houghton*, who had ſince become intereſted, and was one of the plaintiffs. Diligent inquiry was made for *Bate*, at the place where the obligor and obligee lived, without having been able to obtain any intelligence of ſuch a perſon, who he was, where he had lived, or any other circumſtances relating to him; this was ruled to be a ſufficient ground for allowing a proof of the hand-writing

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of the witneſs, who had become intereſted, to be a ſufficient proof of the execution. Nothing was ſaid in this caſe reſpecting the hand-writing of the obligor. Upon the point decided, Mr. J. *Groſe* ſaid, "I do not ſee what the plaintiffs could have done more than they have; and if they have uſed due diligence without effect, that will let them into ſecondary evidence: I form this opinion with reference to what is daily paſſing in the world. The frequency of written inſtruments, in modern times, has made perſons leſs careful than they uſed to be, in the ſelection of witneſſes to their atteſtation. It has occured to me to know that perſons unknown to the parties, ſuch as waiters at a tavern, have been called in to atteſt inſtruments of the moſt important kinds, even wills, where the parties had no previous knowledge of them, nor even were appriſed that they bore the names by which they atteſted the execution (*a*)."

In *Prince* v. *Blackburn*, 2 *Eaſt*, 250, evidence was admitted of the hand-writing of a witneſs, who, at the time of the trial, was out of the juriſdiction of the court, ſo as not to be amenable to the proceſs, though it was objected that there was no proof of his being domiciled abroad, and that the inſtrument being executed in *England* made a diſtinction.

Where a witneſs to a bond was intereſted at the time of his atteſtation, and proof was admitted of his hand-writing, the court, on a motion for a new trial, were of opinion, that he could neither be examined himſelf, nor could proof of his hand-writing be ſufficient, and that it was not like the caſe of a ſubſcribing witneſs, being afterwards appointed executor of the obligee, in which caſe proof of his hand-writing might be given; but on being further informed that the hand-writing of the obligor had been alſo proved, Lord *Kenyon* ſaid, that on conſideration of all the circumſtances, the matter had beſt reſt where it was. *Sevire* v. *Bell*, 5 *T. R.* 371.

A ſubſcribing witneſs having gone to the Eaſt Indies, and it not appearing, after due inquiry, that he had ever returned, and the defendant having admitted the execution of the inſtrument, it was held ſufficient to entitle the plaintiff to a verdict. *Coghlan* v. *Williamſon*, *Doug.* 93. But where, in order to eſtabliſh a bankruptcy

(*a*) It would certainly be attended with great advantage, if a ſyſtem were adopted for having deeds authenticated, by the preſence of a perſon inveſted with public character, either atteſting his own knowledge of the identity of the parties, or having it certified on oath, by an act attached to the inſtrument. It has occurred to me, in practice upon a criminal proſecution, to ſee an inſtance of a forged deed atteſted by an attorney of the higheſt reſpectability; another perſon being introduced to him by the priſoner as the party to the deed. The various queſtions which have occurred reſpecting the inquiry for ſubſcribing witneſſes, ſtrongly evince the propriety of ſelecting, as atteſting witneſſes, perſons of ſettled reſidence, and conſiderable ſtation in life.

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againſt a third perſon, the bankrupt's acknowledgment of a bond was proved, the ſubſcribing witneſs being in England, the court held it inſufficient. *Abbott* v. *Plumbe*, *Doug.* 216. In another action by aſſignees it was proved, in order to ſhew an act of bankruptcy, that the defendant had, upon his examination before the commiſſioners, produced and admitted a bill of ſale from the bankrupt; which was held to be ſufficient proof of the deed as againſt him. *Bowles* v. *Longworthy*, 5 *T. R.* 366. It has ſince been held, without adverting to the preceding caſe, that the defendant's admiſſion, in his anſwer to a bill of diſcovery, was not admiſſible evidence of the execution of the deed, without laying ſome foundation for it, by ſhewing that inquiry had been made for the ſubſcribing witneſs, and that he could not, with due diligence, be met with. It was ſuggeſted, on the part of the plaintiff, that no knowledge of the witneſs could be obtained by him; but the chief Juſtice ſaid, that no one perſon of that name (of whom ſeveral were ſuggeſted in court within reach of inquiry) had been applied to, for the purpoſe of knowing whether he was the ſubſcribing witneſs. The counſel for the plaintiff obſerved, that the court had always conſidered the evidence of the ſubſcribing witneſs material, in order that the defendant might have a diſcloſure of the circumſtances; but here the defendant had an opportunity, together with his acknowledgment of ſtating all the accompanying circumſtances, and therefore could not be hurt. But Mr. Juſtice *Le Blanc* ſaid, that did not follow; a fact may be known to a ſubſcribing witneſs, not within the knowledge of the obligor, and he is enabled to avail himſelf of all the knowledge of the ſubſcribing witneſs, relative to the tranſaction. *Call* v. *Durning*, 4 *Eaſt*, 53. It ſeems very difficult, if not impoſſible, to diſtinguiſh this caſe from the preceding one of *Bowles* v. *Longworthy*. Mr. *Peake*, in his firſt edition, diſtinguiſhes *Bowles* v. *Longworthy* from the other caſes which preceded it, by the difference between a mere verbal acknowledgment, and one made in the courſe of juſtice; but the caſe of *Call* v. *Durning* cannot be ſupported by that diſtinction.

In point of convenience the firſt caſe certainly has ſtronger claims to adoption, in eſtabliſhing the rule upon the ſubject: there is ſomething very remote in the probability of a ſubſcribing witneſs knowing any thing fatal to a deed, which is at the ſame time unknown to the party executing it. The accidental circumſtance, that ſeveral perſons of the name of *Richard Wilſon* (the ſubſcribing witneſs) were known to individuals in court, if it proves any thing, ſeems to prove a great deal too much. The plaintiff was not, by any law, neceſſitated to take notice that that is the name of the Lord Chancellor's ſecretary. If *John Smith* appeared as the name

of

of atteſting witneſs, it would hardly be expected that a party ſhould inquire after every *John Smith* who might be known to the perſons preſent at the trial; an application to one *John Smith* would be a very ſlight proof of a negative propoſition; and it would be very difficult to draw the line between one and a, thouſand.

Where a witneſs who had been ſubpœnaed did not appear, and a written acknowledgment by the party was proved, the deed was allowed to be read. 12 *Mod.* 500. *Bull. N. P.*

In *Breton* v. *Cope*, *Peake*, *N. P.* 30, Lord *Kenyon* held it to be clear, that the rule requiring the proof by an atteſting witneſs, extends to a deed which has been cancelled. In *Kealing* v. *Ball*, *Peake*, *Ev. App.* proof was given of the loſs of a bond, purporting to be executed by the defendant, but the names of the atteſting witneſſes were not remembered by the perſon who proved having ſeen the bond. Evidence was given of an acknowledgment of the debt by the defendant, and this evidence was ruled by Lord *Kenyon* to be ſufficient. His Lordſhip ſaid, that had it appeared who the ſubſcribing witneſſes were, the plaintiff muſt certainly have called them; but that it was the buſineſs of courts of juſtice to apply the general principles of the law to new caſes as they ariſe; and this was a new caſe, for it did not appear that the plaintiff could, by any poſſibility, know who the ſubſcribing witneſſes were. In the caſe of *Birt* and *Barlow*, *Doug.* 171, cited in the preceding ſection, Mr. Juſtice *Buller*, ſpeaking of the neceſſity of examining the witneſſes to a regiſter of marriage, ſaid, that the original regiſter was not neceſſary to be produced; and it was only where that was required, that ſubſcribing witneſſes muſt be called. If this obſervation was intended (as it ſeems) to be general, and not to be merely confined to the preceding ſubject of pariſh regiſters, it is contrary to the opinion incidentally expreſſed by Lord *Kenyon*, in the caſe laſt preceding. The opinion of Lord *Kenyon* ſeems, upon the whole, more analogous to the general ſyſtem of the law upon the ſubject.

Mr. *Peake* obſerves, of a *dictum* of *Gilbert*, that proof of the hand-writing to a deed is not ſufficient, without proving the act of delivery; that it is deſtroyed by the ſubſequent deciſions. It is, however, to be obſerved, of all the caſes reſpecting the hand-writing of witneſſes, that the fact atteſted by their ſubſcription is the ſealing and delivery: but I think that even without that circumſtance, as if the hand-writing of a party was proved, there being no atteſting witneſſes, it would be evidence for the jury of a proper execution. In caſes upon wills it is held, that an atteſtation of the will having been ſigned by the teſtator, in the preſence of the witneſſes, is evidence to be left to the jury, of the witneſſes having complied

complied with the requiſite in the ſtatute of frauds, of ſigning in the preſence of the teſtator. *Hands* v. *James*, *Comyns* 531. *Croſt* v. *Pawlett*, 2 *Str.* 1109 (*a*).

By ſtatute 26 *Geo.* 3. *c.* 57. *ſ.* 38. reciting that difficulties, expence and delay, aroſe in proving deeds in *England*, which were executed in *India*, and *vice verſa*, it is enacted, that in ſuch caſe proof of the hand-writing ſhould be admitted.

It has been ruled, that it is not neceſſary that the ſubſcribing witneſs ſhould actually *ſee* the party execute; for if he be in an adjoining room, and the party, after executing the deed, brings it to him, tells him that he has done ſo, and deſires him to ſubſcribe his name as a witneſs, that is ſufficient. *Park* v. *Mears*, 2 *B.* & *P.* 217.

But though the ſubſcribing witneſs is examined, and denies the deed, other evidence may be admitted, *Doug.* 216. It has even been ſaid, that witneſſes ought not to be admitted to give evidence againſt their own atteſtation. 4 *Bur.* 2224. But this poſition can hardly be true to its full extent. *Ex vi neceſſitatis*, they muſt be examined; and it is impoſſible to compel them to ſwear otherwiſe than as they aſſert the truth to be; certainly ſuch evidence ought to be received with very great ſuſpicion. There was a caſe of conſiderable value, in which the witneſſes to a will denied their atteſtation, but the will was proved by other evidence, and the witneſſes were afterwards convicted of perjury, and ſentenced to tranſportation. *Lowe* v. *Joliffe*, 1 *Bl. Rep.* 365.

A diſtinction has been already referred to, that if a deed is enrolled, which needs inrolment, a copy ſhall be received as evidence; but if it needs no inrolment there, though it be inrolled, the copy is no evidence. *Gilb.* 97. 99. The ſame diſtinction, if

(*a*) I have, in a former note, adverted to the danger of ſubſcribing witneſſes being impoſed upon, by the perſonating of parties with whom they were unacquainted, and to the benefit which might reſult from a ſolemn authentication. This expedient would have the further benefit of diſpenſing with the neceſſity of examining atteſting witneſſes, which would often very much diminiſh the expence of litigation. It would alſo be conducive to the intereſts of juſtice, to eſtabliſh a proviſion, that no plea ſhould be admitted denying the execution of a deed, without its being accompanied by an affidavit of verification, or at leaſt an affidavit of circumſtances, ſhewing that there was a real queſtion upon the fact of execution intended to be tried. Where the queſtion of the execution of an inſtrument is not raiſed by the pleading, it might be very uſeful for the courts to be authorized, by a rule, to require a party to admit or deny, upon oath, before a commiſſioner, the writings purporting to be ſubſcribed with his ſignature, and for the admiſſion to be deemed ſufficient evidence *. Theſe alterations in the law could only be introduced by legiſlative authority, but part of the benefit above ſuggeſted is within the reach of the courts themſelves, who might very beneficially adopt the practice of not allowing any other plea to be joined to that of *non eſt factum*, without ſpecial reaſons verified by affidavit.

* The above idea preſented itſelf to me in adverting the proofs of recognition, mentioned by *Pothier* in the text.

correct, muſt apply to the neceſſity of proof by witneſſes; but Mr. Juſtice *Buller* obſerves, that the law that a bargain and ſale inrolled may be given in evidence, without proving the execution; but that where a deed needs no inrolment there, though it be enrolled, the execution of it muſt be proved, may well be doubted; notwithſtanding that deeds of bargain and ſale inrolled, have frequently, in trials at *niſi prius*, been given in evidence without being proved. In ſupport of which practice, the caſe of *Smartle* and *Williams*, in 1 *Salk.* 280, is much relied upon; but that caſe is wrong reported, for it appears by 3 *Lev.* 387, that the acknowledgment was by the bargainor, and ſo it is ſtated in *Salk. MSS.*; beſides, it appears from both books that it was only a term that paſſed, and conſequently it was no inrolment within the ſtatute. If divers perſons ſeal a deed, and one of them acknowledge it, it may be inrolled, and may ever after be given in evidence as a deed inrolled; but it would be of very miſchievous conſequence to ſay, that a deed inrolled, upon the acknowledgment of a bare truſtee, might be given in evidence againſt the real owner of the land, without proving it executed by him. However, that has been the general opinion, and it ſeems fortified in ſome degree by the ſtatute 10 *Anne*, *c.* 18, which provides, that where any bargain and ſale inrolled is pleaded with a profert, the party to anſwer ſuch profert may produce a copy of the inrolment. On the other hand, it ſeems abſurd to ſay, that a *releaſe*, which has been inrolled upon the acknowledgment of the releaſor, ſhould not be admitted in evidence againſt him, without being proved to be executed, becauſe ſuch releaſe does not need inrolment; and indeed ſuch deeds have often been admitted, and that was the caſe of *Smartle* and *Williams*; the deed did not need inrolment, yet being inrolled, on the acknowledgment of the bargainer, it was read in evidence againſt him, without being proved.

The indorſement of the proper officer is evidence of the inrolment of a bargain and ſale, or of the aſſignment of a duchy leaſe, purſuant to a proviſo. *Vi. Kinnerſley* v. *Orpe*, *Doug.* 56.

In caſe of a deed being accidentally cancelled, there are ſeveral diſtinctions to be found, ariſing from the nature and operation of the deed, and of the neceſſity for its being offered to the court in pleading; likewiſe, reſpecting its being directly the point in iſſue, or only coming in incidentally. I apprehend it may now be juſtly ſtated, that all theſe diſtinctions are exploded, and that it is an univerſal rule, that ſuch an accidental circumſtance will in no caſe prejudice a right which has been duly acquired. Whatever objections would exclude the admiſſion of a deed thus cancelled, would apply with equal force to the admiſſion of collateral or preſumptive

tive evidence, of a deed abſolutely loſt: but recent practice has eſtabliſhed the admiſſion of that evidence beyond the reach of controverſy. And the courts have, in modern times, ſo completely deviated from the ancient ſtrictneſs, by which there was a failure of juſtice, according to the ordinary courſe of law, in the caſe of a deed being loſt or deſtroyed, as to allow very extenſive rights to be held under the fictitious authority of deeds and inſtruments which never had, nor in truth could ever have, been believed to have had an exiſtence, except in the imagination. Such is the nature of the preſumptions, which were examined with ſome particularity in the preceding number.

The following diſtinctions, ſtated by *Gilbert*, are founded upon a fair analogy, and ſeem fully applicable to the caſe of a deed cancelled by deſign.

"If there be a joint contract, or obligation, and one of the obligors' ſeals be torn off, it deſtroys the obligation, becauſe they are both bound as one perſon; and if one be diſcharged, the other cannot ſtand obliged, becauſe they both make up but one obligor. But if two perſons be bound ſeverally, there, if the ſeal of one of the obligors be broken off, yet the obligation continues in the other, becauſe there are ſeveral contractors and ſeveral contracts, and therefore by deſtroying the obligation of one of them, the obligation of the other is not taken away. But if two men are bound jointly and ſeverally, and the ſeal of one of them is torn off, this is a diſcharge to the other; for the manner of the obligation is diſcharged by the act of the obligee, and therefore that is, according to the rule of law that conſtrues every man's act moſt ſtrongly againſt himſelf, a diſcharge of the obligation itſelf; beſides, ſince both are jointly bound as one perſon, the perſon diſcharging one of them is a diſcharge of the whole; and a ſatisfaction is ſuppoſed, by the very cancelling it, to be given for the whole debt; and when one man is diſcharged who concurs to make an obligor, and the whole debt is ſatisfied, no obligation can reſt upon the other."

With reſpect to alteration of deeds, the rule has been, that if an alteration has been made by a ſtranger, in a point which is not material, it does not avoid the deed; but it is otherwiſe, if it is altered by a ſtranger in a point material, for the witneſſes cannot prove it to be the act of the party that ſealed and delivered it, when there is any material difference from the ſenſe of the contract; but if the contract doth contain the ſenſe of the parties, the witneſſes may well ſwear it to be their act, for an immaterial alteration doth not change the deed, and conſequently the witneſſes may atteſt that very deed without danger of perjury. But if the deed be altered by the party himſelf, though in a point not material, yet it

will avoid the deed; for when the party himſelf makes any alteration in his own deed, it diſcharges the contract, for the contract hath the whole force from the words of the obligor; now, when the obligee undertakes to ſupply it with new words, and to alter thoſe the party hath fixed upon, this is according to the rules of law which takes every man's own act moſt ſtrongly againſt himſelf; a new making, and a new framing of the contract, and for a man to contract with himſelf, is entirely void and ineffectual. 11 *Co.* 27.

The rule concerning the alteration by a ſtranger, in a material part, has been extended to bills of exchange, in the modern caſe of *Maſter* againſt *Miller*, in which the determination of the King's Bench was confirmed by the Exchequer Chamber. 4 *T. R.* 320. 2 *H. B.* 141. It was found by ſpecial verdict, that the date of the bill had been altered by ſome perſon unknown, and the bill was ruled to be thereby utterly vacated. One judge maintained the oppoſite opinion, but that one was Mr. Juſtice *Buller*. And with all the deference which is due to the authority of a ſolemn adjudication, it is impoſſible to read his moſt excellent argument upon the occaſion without regretting, that what was indiſputably the real juſtice of the caſe, ſhould be ſacrificed to the application of a technical rule, extended beyond all former precedent, and that rule itſelf rendered diſputable in principle, by deciſions upon caſes having a fair analogy in their nature and circumſtances.

That the rights and obligations of two perſons ſhall not be affected by the unauthorized conduct of a third, whether proceeding from folly or from guilt, is a rule which is founded upon the eternal principles of juſtice.

In reſpect of deeds, the ancient rules of pleading had rendered it neceſſary, that the deed itſelf ſhould be formally tendered to the court. If the deed was accidentally loſt, or cancelled, the party claiming under it was without a remedy, by the ordinary courſe of law. Theſe rules were not, in their nature, applicable to inſtruments not under ſeal; and the reaſons ſtated for rendering a deed inefficacious, which has been altered by a ſtranger, ſeem entirely to proceed from the ſuppoſition of the deed being brought by profert before the court.

In the progreſs of judicial improvement, when it appeared that the ſeals had been torn from a deed by the play of a child, good ſenſe was allowed to prevail, and the effect of the inſtrument was ſuſtained. In the caſe of *Read* againſt *Brookman*, 3 *T. R.* 151, the ſame judges of the King's Bench, who decided that in *Maſter* and *Miller* the bill was vacated, ruled moſt properly, that profert of a deed might be diſpenſed with, by ſhewing that it was loſt by time,

time, or accident. In the caſe of *Bolton v. The Biſhop of Carliſle*, 2 *Hen. Bl.* 259, the three ſurviving judges of the Common Pleas, who had before concurred in the affirmance of *Maſter* and *Miller*, gave their opinion, which I admit was not eſſential to their deciſion, but which ſtill was given in a manner entitling it to judicial authority, that an allegation might be allowed, that a deed was cancelled by the ſeal being torn off and deſtroyed, or loſt, and profert made of the remainder. Lord Ch. Juſtice *Eyre* ſaid, "That if the deed be deſtroyed, God forbid that a man ſhould loſe his eſtate by loſing his title deeds." Mr. Juſtice *Gould*.—"As to the cancelling a deed, a man's title to his eſtate is not deſtroyed by the deſtruction of his deeds. The caſe where the ſeal was torn off by rats, muſt be in the recollection of every one." Mr. Juſtice *Heath*.—"Surely no one will ſay that if deeds ſhould happen to be ſtolen, therefore the owner ſhould loſe his eſtate." Mr. Juſtice *Rooke*.—(who came upon the bench ſubſequent to the deciſion of *Miller* and *Maſter*,) "I agree, that a right once veſted is not diveſted by merely cancelling the deed." According to the principles of correct reaſoning, it would certainly appear, that the circumſtance of cancelling, which deſtroys the very appearance of a deed, or the actual loſs of the deed itſelf, ſhould produce as extenſive conſequences as an alteration in the writing. There is no reaſon why the officiouſneſs of a ſtranger ſhould induce a greater prejudice than the playing of a child, or the deſtruction by rats: and every argument is entitled to the moſt favourable reception, which maintains the eſſential intereſts of right and juſtice, in oppoſition to diſtinctions which are merely technical in their nature, and which are not fully ſupported by the moſt imperious authority.

That even an immaterial alteration by the party claiming under a deed, or writing, ſhould defeat the inſtrument as againſt himſelf, does not ſeem objectionable; and the rules of evidence can never be underſtood to mean, that the one party can, by altering an inſtrument, defeat the intereſts of the other: where both parties concur in altering a deed, the protection of the revenue intervenes to prevent its validity, unleſs there is a new ſtamp. Where there are razures or interlineations appearing on the deed, it becomes a queſtion of fact for the jury, whether they were made before or ſubſequent to the execution; and the deciſion of that queſtion muſt of courſe depend upon the particular circumſtances of each individual caſe.

SECTION VI.

Of Evidence of Hand-writing.

The proof of hand-writing is a ſubject which concerns every kind of document, that may be adduced in evidence. *Gilbert*, in ſpeaking of an indictment for perjury upon an anſwer in Chancery, obſerves, that the perjury may be illuſtrated by the compariſon of hands, which poſſibly may be evidence in concurrence with other proof, that out of the anſwer itſelf evince the identity of the perſon. But that the compariſon of hands only, ſhould be a proof in a criminal proſecution, was never law but only in the time of king *James*; and the diſtinction has ever been taken, that the *compariſon of hands* is evidence in civil, and not in criminal caſes. The reaſon why the compariſon of hands is allowed to be evidence in civil matters, is, becauſe men are diſtinguiſhed by their hand-writing as well as by their faces, for it is very ſeldom that the ſhape of their letters agree, any more than the ſhape of their bodies; therefore the compariſon of hands ſerves for a diſtinction in civil commerce, for the likeneſs does induce a preſumption that they are the ſame, and the preſumption is evidence till the contrary appears. For every preſumption that remains unconteſted hath the force of an evidence; for light proof on the one ſide will outweigh the defect of the proof on the other, but in criminal proſecutions the preſumption is in favour of the defendant; for thus far is to be hoped of all mankind, that they are not guilty in any ſuch inſtances, and the penalty inhances the preſumption. Now the compariſon of hands is no more than a preſumption, founded only on the likeneſs which may eaſily fail, becauſe they are very ſubject to be counterfeited; therefore, when the compariſon of hands is the only evidence in a criminal proſecution, there is no more than one preſumption againſt another, which weighs nothing.

I am not diſpoſed to conteſt the principle, that, in the application of evidence and in weighing its effect, a jury, reſting upon the general preſumption of innocence, may, without violating their duty, be more backward in drawing from the premiſes before them a concluſion which ſhall amount to the eſtabliſhment of guilt, than they would be in drawing a concluſion from premiſes not more ſtrong in the diſcuſſion of a civil right. But the general rules of law, concerning the admiſſion and ſufficiency of evidence, and the particular concluſion which a jury may draw from the evidence before them, in a particular caſe, are two things, which, as I have already more than once obſerved, whilſt they differ moſt eſſentially in their nature and principle, are very ſubject to be confounded,

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and which, therefore, in every diſcuſſion, ſhould be moſt carefully kept diſtinct.

There ſeems to be ſomething extremely illogical in the remarks which have been cited, as ſerving for the foundation of a general rule; "for if men are diſtinguiſhed by their hand-writings as well as their faces, as it is very ſeldom that the ſhape of their letters agree any more than the ſhape of their bodies;" the ſame reaſon which convinces the mind, that a particular writing has come from the hand of a particular perſon, will equally produce that evidence whether the ulterior reſult is of one kind or another. The adequacy of evidence in its nature, to afford conviction of a particular fact, can never depend upon the effect and conſequences of the fact intended to be proved. I conceive that the diſtinction is fully contradicted by modern authorities. In the caſe of the *Attorney General* and *le Merchant*, which has been already mentioned, it was laid down as a general propoſition, (without any thing to confine it to the ſubject matter immediately under conſideration,) that the rule of evidence in civil and in criminal caſes is the ſame; the particular queſtion which led *Gilbert* to the diſcuſſion of the general topic, has produced a determination directly oppoſite to the doctrine which he ſuggeſts; for in *The King* againſt *Morris*, 2 *Bur.* 1189, upon an indictment for perjury, in an anſwer in Chancery, proof of the hand-writing of the defendant, and the atteſtation of the jurat by the proper officer, were ruled to be ſufficient evidence of the anſwer being actually ſworn, ſo far at leaſt as to put it on him, to ſhew or to raiſe a probable preſumption that he was perſonated.

In the caſe of high treaſon, compariſon of hands is not ſufficient for the original foundation of an attainder, becauſe there muſt be ſome overt act, and writing is not an overt act; but it may be uſed as in circumſtantial and confirmatory evidence, if the fact be otherwiſe proved. *Rex* v. *Henſey*, 1 *Bur.* 664. And in any other criminal proſecution, it will be evidence the ſame as in a civil ſuit, as on an indictment for writing a treaſonable libel, proof of the hand-writing will be ſufficient, without proof of the actual writing. The caſe of the ſeven biſhops went upon the witneſs not being enough acquainted with their hand-writing, and not upon the nature of the evidence. *Bul. N. P.* 236 (*a*).

As to the nature of the proof upon this ſubject. In *Gould* v. *Jones*, 1 *Bl.* 384, Lord *Mansfield* admitted a witneſs to prove a perſon's hand-writing forged, who had frequently correſponded with him, but had never ſeen him write. In the caſe of *Goodtitle*,

(*a*) See the Collection of Caſes on this ſubject in *M'Nally's Law of Evidence in Pleas.*

on the demiſe of *Revett* v. *Braham*, 4 *T. R.* 497, on a queſtion of forgery, upon a trial at bar, the plaintiff called two clerks of the Poſt Office, who ſwore that they were uſed to inſpect franks, and detect forgeries. They were then aſked, Whether, from their general knowledge of writing, the inſtructions were a natural or an imitated hand? this queſtion was objected to, but allowed by the court, and the clerks ſwore that the hand was imitated; but in a ſubſequent caſe of *Cary* v. *Pitt*, *Peake*, *Ev. Ap.* Lord *Kenyon* refuſed to admit ſuch evidence, ſaying, that though it was received in *Revett* and *Braham*, he had in his charge to the jury laid no ſtreſs upon it. With all deference, however, the ſolemn deciſion of a court, upon the admiſſibility of a piece of evidence, is not affected by the opinion of a ſingle judge, reſpecting its materiality in the particular inſtance.

It is now very clearly eſtabliſhed by ſeveral authorities, that the proof of hand-writing muſt be made by perſons having a previous knowledge of it, either from actually ſeeing the party write, or from correſpondence; and that the compariſon of an admitted with a diſputed writing cannot be allowed, either by the inſpection of the court and jury, or by the aſſiſtance of perſons converſant with the examination of hand-writing, for the purpoſe of aſcertaining its reality or detecting its forgery.

The reverſal of the attainder of *Algernon Sidney*, which is often referred to as regulating the law upon this ſubject, does not ſeem to give much ſupport to the diſtinction in queſtion; for the act of reverſal ſtates ſeveral grounds and motives for infringing the conviction; and as to the hand-writing, there was that evidence of knowledge, which is now allowed to be admiſſible.

In one caſe where a parſon had been long ſince dead, Lord *Hardwicke* admitted his book to prove *a modus*, the ſimilitude of the hand-writing being proved by a witneſs, who had examined the pariſh books in which was the ſame parſon's name. *Bull. N. P.* 236. But in another caſe, Mr. Juſtice *Yates*, at *niſi prius*, refuſed to let an entry, ſtated to be in the hand-writing of a deceaſed perſon, be proved by compariſon with his returns to the ſpiritual court. *Brookbard* v. *Woodby*, *Peake*, *N. P.* 20. *n.*

Mr. *Peake*, in his Law of Evidence, ſeems to put the firſt caſe upon the circumſtance of the witneſs having a general knowledge of the hand-writing appearing in the books, as diſtinct from the act of comparing and examining the two writings; in which point of view theſe caſes may be poſſibly reconciled with each other.

In one caſe, Lord *Kenyon* accompanied his deciſion, that compariſon of hands was no evidence, with the obſervation that if it were ſo, the ſituation of a jury who could neither read or write would be a ſtrange

a ſtrange one, for it would be impoſſible for ſuch a jury to compare the hand-writing. *M'Pherſon* v. *Thoytes*, *Peake*, *N. P.* 20. Perhaps the occurrence itſelf of a jury, who could neither read or write, might be rather ſtrange, but it does not ſeem the moſt accurate reaſoning, to reject an aſſiſtance which in general caſes would be beneficial, becauſe in ſome poſſible caſe it might happen to fail; and a general preſumption that a jury could read and write, would be at leaſt as moderate as many preſumptions, which have in fact been introduced into the adminiſtration of juſtice.

The general ſubject lately came under the conſideration of Lord *Eldon*, in the Court of Chancery; and produced a very full and elaborate diſcuſſion, which may be referred to as containing an accurate view of the exiſting law upon the ſubject. *Eagleton* v. *Kingſton*, 8 *Veſ.* 438, and the practice of the law ſeems to be clearly ſettled, that the caſual knowledge or belief of a perſon, who has once ſeen a witneſs write, and ſpeaks from the effect of that incident upon his memory, in reſpect to the character of the writing, is admiſſible, and a ſufficient foundation for reading the diſputed paper; but that a direct compariſon with the greateſt poſſible number of authentic papers, indicating the ſimilarity to the moſt obvious inſpection, and confirmed by the moſt critical ſcrutiny, is wholly inadmiſſible.

But where, in point of reaſon, is the objection to a proof by compariſon of hands, as founded upon an inſpection at the trial? It will ſurely be admitted that the real object is the inveſtigation of truth, and by the indiſcriminate rejection of a means of eſtabliſhing the truth, which in many inſtances muſt be more convincing than the evidence actually received, there is a frequent riſk of the failure of juſtice. Every danger which may reſult from the caſe of forgery, muſt operate at leaſt with equal force, when the deception is aided, by the compariſon being made, not with the immediate object of the ſenſes, where the erroneous impreſſions of one perſon may be corrected by the more accurate inſpection of another, but with the traces in the memory, the errors and imperfections of which are beyond the reach of ſcrutiny. What is the common evidence of knowledge but an act of compariſon; a compariſon of the object preſented to the ſight, with the object imprinted by memory in the mind, with the image and copy of the ſuppoſed reality? And when the compariſon is made not with this imperfect and fallacious copy, but with an indiſputed original, applied with the ſkill and experience of perſons habitually devoted to ſimilar inquiries, it is deemed not only a matter of technical caution, but an eſſential point of conſtitutional liberty, to reject the aſſiſtance which it may be naturally expected to afford. An expert of the moſt accurate

curate talents, comparing the characters of the admitted writing of an individual, through a continued ſeries of years, with the character of a diſputed piece, cannot be heard to offer his opinion, whilſt the knowledge and familiarity that the mind may be ſuppoſe to have acquired, from the previous peruſal of thoſe very writings, or even from the caſual inſpection of a ſingle act, is received and acted upon without objection. I have known the admiſſion of this evidence carried ſo far, as for an attorney, after the failure of other attempts, to ſtand up and ſwear to a knowledge of the writing of the oppoſite party, from having once looked over his ſhoulder when writing a letter at an alehouſe (*a*). I have purpoſely ſtated extreme degrees, becauſe by theſe the character of a propoſition is moſt diſtinctly ſhewn, and in the admiſſibility of evidence, the law allows no latitude of diſcretion.

SECTION VII.

Of Writings inferior to Deeds.

It does not occur to me to be neceſſary to make any general obſervations reſpecting writings inferior to deeds, having in a preceding ſection pointed out the diſtinguiſhing character of deeds, as conſtituting or diſcharging obligations *proprio vigore*, whilſt writings of an inferior nature are only the evidence of a contract, which, in its nature and quality, is not of higher rank than if it was merely verbal or of a matter of fact: the peculiar character of bills of exchange, and promiſſory notes, does not fall within the purpoſe of the preſent examination.

The rules laid down, with reſpect to the evidence of deeds, are equally applicable to other inſtruments with reſpect to the neceſſity of producing the original, or, in caſe of its non-productions ſupplying the omiſſions by the beſt inferior evidence, and the whole of the ſyſtem eſtabliſhed reſpecting the examination of ſubſcribing witneſſes, is equally applicable to other inſtruments; but it may be proper to take notice as to the firſt of theſe ſubjects, that duplicates of notices, ſerved upon any perſon, are in general regarded as equally original, with the copies actually delivered. In other caſes, a notice to produce the original muſt be given to the party intended to be charged with it, or affected by it, in caſe it is or ought to be in his poſſeſſion. Where the terms of an agreement are reduced into writing at the time, as evidence of the

(*a*) *Lancaſter* Summer Aſſizes, 1799; but it is proper to add, that the ſame judge who allowed the reception of this evidence, made ſome obſervations upon it which decided the fate of its credibility.

agreement,

agreement, the writing muſt be produced, and muſt have the proper ſtamp, and no parol evidence of the agreement can be admitted; but when there is written evidence of a matter of fact, as a receipt for a ſum of money, proof may be given of the fact of payment, or of a diſtinct verbal acknowledgment, as was ſhewn in *ſ.* 2, *ſupra.*

The preceding ſection, reſpecting the proof of writing, is alſo of general application; and in point of fact, the ſubject to which it refers is of much more frequent application in other caſes, than in verifying the ſignatures of deeds.

Upon the evidence of books of account, there is, in many reſpects, a conſiderable affinity between the doctrine ſtated in the text of *Pothier*, and the practice of the *Engliſh* law. The doctrine of ſemiproofs, by which a perſon may obtain a deciſion in his favour, by the teſtimony of his books, confirmed by his own ſuppletory oath, has not with us any kind of application. A perſon can in no caſe require his own books to be received as evidence in his favour; but if the other party refuſes to call for them, and the party himſelf is willing that they ſhould be produced, it will ſometimes lead to pretty ſtrong inferences in the mind of a jury, with reſpect to the veracity and effect of other evidence.

One party has no right to compel the other to produce his books; but if notice is given for that purpoſe, and they are not produced accordingly, not only may verbal evidence be given of their contents, but the mere refuſal to produce them will always be conſidered as a very ſtrong preſumption of their contents being unfavourable.

A perſon who requires the production of books belonging to another, muſt make his election whether they ſhall be received as evidence; he has not a right firſt to inſpect them, and then uſe them or not according to his diſcretion. Being admitted, their whole contents muſt be allowed as evidence; but that, as was before obſerved concerning other written evidence, does not neceſſarily conclude the veracity of their entire contents. A party cannot make any diſtinction with reſpect to what part ſhall be received, but a jury may diſtinguiſh with reſpect to matters of credit, and admit one part whilſt they diſallow the other; but without ſome circumſtances to induce a particular ſuſpicion, it is unreaſonable that ſuch diſtinctions ſhould take place.

The following is a note of ſeveral caſes, which have occurred reſpecting the admiſſion of different pieces of written evidence.

" Where the draymen came every night to the clerk of a brewhouſe, and gave him an account of the beer delivered, which he

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ſet down in a book kept for that purpoſe, to which the draymen ſet their hands, and the drayman was dead, the book with his hand ſet to it was held good evidence of a delivery. *Price* v. *Lord Torrington*, 1 *Salk.* 285. So, a ſhop book was allowed for evidence: it being proved that the ſervant that writ the book was dead, and that this was his hand, and he accuſtomed to make the entries. *Pitman* v. *Maddox*, 2 *Salk.* 690. But where the plaintiff, to prove a delivery, produced a book which belonged to his cooper, who was dead, but his name ſet to ſeveral articles as delivered to the defendant, and a witneſs was ready to prove his hand, Lord Ch. Juſtice *Raymond* would not allow it, ſaying, it differed from Lord *Torrington*'s caſe, becauſe there the witneſs ſaw the drayman ſign the book every night. *Clerk* v. *Bradford*, *M.* 5 *Geo.* 2. Upon an iſſue out of Chancery, to try whether eight parcels of *Hudſon's Bay* Stock, bought in the name of Mr. *Lake*, were in truſt for Sir *Stephen Evans*, his aſſignees (the plaintiff's) ſhewed firſt, that there was no entry in the books of Mr. *Lake*, relative to this tranſaction. Secondly, ſix of the receipts were in the hands of Sir *S. E.* and there was a reference on the back of them, by his book-keeper, to the book *B. B.*, of Sir *S. E.* Thirdly, the book-keeper was proved to be dead, and upon this the queſtion was, whether the book of Sir *S. E.* referred to, in which was an entry of the payment of the money, ſhould be read? And the Court of King's Bench, at a trial at bar, admitted it not only as to the ſix, but likewiſe as to the other two, in the hands of Sir *B. L.*, ſon of Mr. *Lake*. And in *Smartle* v. *Williams*, cited by Lord *Hardwicke*, in *Montgomery* v. *Turner*, 1751, a ſcrivener's book of accounts, the ſcrivener being dead, was holden good evidence of payment. *Bull. N. P.* 282, 283. In *Searle* v. *Lord Barrington*, 2 *Str.* 807. & Lord *Raym.* 1370. 8 *Mod.* 278. 3 *Br. P. C.* 535, the court were of opinion, that an indorſement by the obligee, of a bond of payment of intereſt, was good evidence to encounter the preſumption of payment, ariſing from length of time, and ought to have been left to the jury, for they might have reaſon to believe it was done with the privity of the obligor; and the conſtant practice is for the obligee to indorſe the payment of intereſt; and that, for the ſake of the obligor, who is ſafer by taking ſuch an indorſement than by taking a looſe receipt; and the judgment given upon ſuch evidence, was, on a bill of exceptions, affirmed in parliament; but in *Turner* v. *Criſp*, *Hil.* 13 *Geo.* 2. the Chief Juſtice refuſed to let the indorſement of the receipt of part of the money, ſecured by a bond which was made after the preſumption had attached, be given in evidence. 2 *Str.* 827. The debt book of an attorney, long ſince deceaſed, where he charges 32*l.* for ſuffering

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ing a recovery, two articles of which were for drawing and ingroſſing the ſurrender of a tenant for life, and which bill appeared by the book to have been paid, was held admiſſible evidence of there having been ſuch a ſurrender. *Warren* v. *Grenville*, 2 *Str.* 1129. A bill of parcels, and receipt of a merchant abroad, was admitted to prove the plaintiff's intereſt in a cargo againſt the inſurer. *Raſſel* v. *Boheme*, 2 *Str.* 1127. A paper in the hand-writing of a teſtator, containing a liſt of bank notes found in his poſſeſſion at or before his death, was held, by Lord *Hardwicke*, inadmiſſible to prove his property in thoſe notes; but he ſent the caſe to be tried at law, obſerving that the rules of evidence in general are the ſame in both courts as to matters of fact. *Glyn* v. *Bank of England*, 2 *Veſ.* 38. Entries of a deceaſed ſteward in a common day-book, containing variety of matters, relative to his different employers, of money paid by perſons for treſpaſs on a particular place, on account of one of thoſe employers, were held admiſſible evidence, in an action relative to the right of ſuch employer to the place in queſtion, as they would have been evidence to charge himſelf with the receipt of the money. *Barry* v. *Bebbington*, 4 *T. R.* 414. An entry by the church-wardens of *A.* in their accounts, ſtating the receipt of a ſum of money from the chapelry of *B.*, who that year diſputed their ancient cuſtom; but after being ſued had paid it, and *1l.* for coſts, and the following writing at the head of the ſame page: "It is an ancient cuſtom thus to apportion our poor lay, *B.* to pay one fifth, &c." was held good evidence of the cuſtom, the one entry as it charged the officers with the receipt of money, and the other as referring to and explaining that; and Lord *Kenyon*, ſaid, that even without that reference, he did not ſee any objection to admitting the ſecond entry as evidence *propriâ vigore*, becauſe uſages relating to pariſhes muſt be got out of the pariſh books; it is like the inſtance of court rolls, which are frequently admitted in evidence, though they affect the rights of third perſons. However, it was not neceſſary to decide upon that ground, though he had a ſtrong opinion of it. *Stead* v. *Heaton*, 4 *T. R.* 669. On a queſtion reſpecting the identity of a place, the coals under which, and alſo a rent iſſuing out of it, belonged to one of the parties under different titles, the entry in the book of a perſon under whom the party claimed the rent, but not the coals (which were the ſubject in diſpute), of receiving the rent for a particular place, was held inadmiſſible evidence; for, by Lord *Kenyon*, what one man does in his cloſet ought not to affect the rights of third perſons; there is only one inſtance in which this is allowed, namely, the books of an incumbent reſpecting tithes, which may be evidence for his ſucceſſor,

ceſſor, but that has always been conſidered an excepted caſe. *Outram* v. *Morewood*, 5 *T. R.* 121.

In reviewing the preceding caſes, there are ſome which appear to be founded upon rather diſputable principles. The caſe of the draymen ſigning the entry, and the ſtill ſtranger caſe of the ſhop book, are inſtances of perſons being affected by evidence made behind their back, with intent to preſerve a charge againſt them, and which they had no opportunity to croſs-examine. If the drayman and the clerk had told another perſon, that ſuch circumſtances had paſſed, and that perſon had immediately made a minute of it in writing, it will not be ſuppoſed that a depoſition, conſiſting ultimately of ſuch hearſay evidence, would be allowed. If one man writes down that he ſaw a given act done, would the parties to that act be allowed to be affected by ſuch a minute, any more than by a hearſay declaration? Would his ſignature make the evidence any better? And is there any ſubſtantial difference, in this reſpect, between a ſtranger who obſerves a tranſaction, and a perſon who is an inſtrument in it, and who is only from neceſſity allowed to be a competent witneſs, having himſelf a degree of intereſt in the ſubject. When a broker is agent for both parties, his minutes, which are part of the *res geſtæ*, would fall under a very different conſideration.

The caſe of Lord *Barrington* was founded upon very ſound reaſoning; at the time of making the entry (which, it is an admitted fact, was before the preſumption had attached) *Serle* could have no undue motive; the purpoſe was merely to indicate a diſcharge. The bond itſelf would be perfect evidence of his claim; but in the caſe which immediately followed, it was not thought that a perſon whoſe right, if adverſely conteſted, was at an end, could revive it by any act of his own. Having no legal claim to 100*l.* he could not found a right to 90*l.*, by giving credit for 10*l.* *Barry* and *Bebbington* certainly went abundantly far, where a ſteward, by charging himſelf to his employer with the receipt of a ſmall ſum of money, was allowed to charge a third perſon with the admiſſion of a right. But *Stead* and *Heaton* ſeems to be directly repugnant to the caſe, in which the receipt of part of the money on the bond, after the preſumption had attached, was diſallowed; for though, to a ſmall extent, the entry made by perſons intereſted had a tendency to charge themſelves, it, to a much greater extent, had a tendency to induce a charge in their favour againſt the perſons to whom it related. It was preſerved and recorded as evidence of the ſubmiſſion to a diſputed right. The general effect and object of it were to ſubſtantiate that right in themſelves. And if one public body ſhall not be allowed to charge another public

public body by their entry of a debt, it would be abſurd to let them obviate the objection, by ſubjoining the entry of a partial payment amounting to a recognition. If the perſons who made the entry had appeared as witneſſes to prove the fact, retaining the ſame character of inhabitancy, they would have been rejected as intereſted. Their death was allowed to give a weight to that as written evidence, which as oral teſtimony could not have been allowed; contrary to one of the moſt eſſential rules upon the ſubject, they were admitted to make evidence for themſelves. As to entries in public books regularly and periodically kept, and perfectly free from all the imputations, which occur to an entry of ſuch a nature as has laſt been conſidered, their character is ſo materially different, that the eſtabliſhing a propoſition reſpecting the one cannot fairly induce a material argument to affect the other.

The particular exceptions from the rules of evidence in general, which apply to caſes of pedigree, and ſome other ſubjects, being equally connected with written and with hearſay evidence, the conſideration of them is at preſent deferred.

SECTION VIII.

Of the Statute of Frauds.

The advantages which reſult from fully and explicitly ſtating in writing, the object and terms of any civil tranſaction, are ſo obvious and conſiderable, that almoſt every ſyſtem of juriſprudence manifeſts a decided preference to written memorials over verbal repreſentations, in evidencing the occurrences of ſocial intercourſe.

The death of witneſſes, the imperfections of their memory, their miſconception, and ſometimes their wilful miſrepreſentations of the communications, which they are called upon to teſtify, are productive of inconveniences which are ſtrongly contraſted by the introduction of authentic monuments, in which the intention of the parties is ſuppoſed to ſpeak for itſelf, and which are not to be affected either by the artful gloſſes, the inaccurate perceptions, or the natural infirmities, of caſual obſervers. This general obſervation may be applied, with particular force, to the advantage of eſtabliſhing a criterion for diſtinguiſhing between acts which are conſummated by a mutual intention, concluſively fixed and determined, and acts of inchoate and preliminary communication; between the contracting an obligatory engagement, and the making a caſual

caſual intimation or ſuggeſtion. The ſame effect is in a conſiderable degree produced, by the uſe of known eſtabliſhed tokens, which may eaſily and generally be underſtood, as marking a ſettled and certain determination; but whilſt theſe are free from the dangers of miſconception, they leave the ſubject expoſed to the caſualties of time; and conſequently are inferior in their utility to the permanent evidence of an authentic writing. In all caſes, therefore, where the nature of the ſubject indicates a probability, that a knowledge of the circumſtances may be important at a diſtant period, it is matter of utility not only to ſhew a preference to the teſtimony of writing, but to render it an eſſential requiſite.

There is alſo a material difference in reſpect to the danger of miſrepreſentation, between obligations founded merely upon a communication of intention, without the intervention of any poſitive acts, ſuch as a contract for the ſale of goods, to be delivered at a future period, and thoſe which ariſe from a matter of fact, that has actually intervened, as the loan of a horſe.

From theſe conſiderations, inſtitutions of poſitive regulation have been eſtabliſhed in different countries, for aſcertaining the exiſtence of agreements, intended to be obligatory upon the parties between whom they intervene; and although the regulations, thus framed, are often neglected by an injudicious confidence which operates to the detriment of individuals, and the advantage which is taken of them is too frequently in oppoſition to the principles of integrity, they are, in their general operation, of conſiderable benefit to the community.

In the forming ſyſtems for the purpoſe, while the advantages above referred to are properly eſtimated, the inconvenience of loading the ordinary occurrences of life with an unneceſſary incumbrance, ſhould not be entirely left out of the conſideration; and while it may be proper to require that ſo important an object, as a contract for the future purchaſe of a conſiderable eſtate, ſhall be authenticated by writing, there would apparently be but little utility in preſcribing a ſimilar requiſite, in order to compel a perſon to return a watch that he had borrowed, or pay for one which he had purchaſed and received.

The *French* ordonnance, which is the ſubject of the text in *Pothier*, that has occaſioned theſe obſervations, ſeems to have laid rather too great a ſtreſs upon the firſt of theſe conſiderations, without paying ſufficient regard to the other; and it is evident that the excluſion of all proof reſpecting matters of fact, ariſing upon contracts where the object exceeds ſo inconſiderable an amount as 100 livres, a little more than 4*l.* muſt often occaſion a failure of juſtice, eſpecially when it is carried ſo far as in the caſe adduced, of

preventing a man from recovering the goods which he had depoſited in the cuſtody of a friend.

The ſtatute of frauds, 29 *Ch.* 2. *c.* 3, which, with ſeveral other regulations, unconnected with the preſent inquiry, introduces a ſyſtem founded upon an analogous principle, and I think was moſt probably ſuggeſted by the *French* ordonnance, is free from this imputation: for, while it excludes in ſeveral caſes, a proof by oral teſtimony, with reſpect to matters of mere agreement, in their nature liable to miſrepreſentation, it leaves untouched the evidence which is founded upon matters of fact; and in reſpect to the moſt ordinary contract of ſociety, the ſale of goods, it admits the full completion of a mutual obligatory intention, to be evidenced by other tokens than a written agreement.

This ſtatute (many parts of which are by no means penned with technical accuracy,) has been alternately the ſubject of panegyric, and reprehenſion; Lord *Kenyon* always ſpoke of it in terms of commendation; with Lord *Mansfield* it appears to have been by no means a favourite. It has certainly given riſe to more conteſted queſtions than any ſtatute in the book, except that reſpecting the ſettlements of the poor; and the Honourable *Daines Barrington*, many years ago remarked, in his obſervations on the ſtatutes, that the explanation of it had not been attended with a ſmaller expence than 100,000*l.* A great part of this expence, however, may perhaps not be ſo juſtly imputed to the framers of the ſtatute, as to the adminiſtration of it, upon a principle of relaxed conſtruction.

Both the ſtatute, and the ordonnance have, in their expoſition been regarded, as rendering the compliance with their proviſions rather a neceſſary evidence of the contracts to which they refer, than as an eſſential and conſtituent part of the contracts themſelves; and exceptions have therefore been admitted, where the want of this evidence has been ſupplied by the judicial acknowledgment of the parties (*a*).

To proceed, after perhaps an unneceſſary length of preface, to the proviſions of the ſtatute itſelf, ſo far as they are connected with the preſent object; it is enacted that all intereſts in land, created by parol only, and not put in writing, and ſigned by the parties creating the ſame, or their agents lawfully authoriſed in writing, ſhall only have the force of leaſes at will, *ſ.* 1. except leaſes not exceeding the term of three years from the making thereof, whereupon the rent reſerved ſhall amount to at leaſt two thirds of the annual value, *ſ.* 2. And that no action ſhall be brought to charge any executor, or adminiſtrator with damages

(*a*) See the preceding Treatiſe, No. 15, and Note.

out of his own eſtate, or to charge the defendant, upon any ſpecial promiſe, to anſwer for the debt, default or miſcarriage of another perſon; or to charge any perſon upon any agreement, made in conſideration of marriage, or upon any contract or ſale of lands, or any intereſt in them, or upon any agreement not to be performed within one year from the making thereof, unleſs the agreement upon which ſuch action is brought, or ſome note or memorandum thereof ſhall be made in writing, and ſigned by the party to be charged, or ſome other perſon by him lawfully authoriſed, *ſ.* 3.

In the expoſition of theſe clauſes, ſeveral exceptions have been introduced, where the object and effect of the ſtatute ſeemed to be otherwiſe ſufficiently ſecured; when the agreement was in a ſuit in equity admitted to be made, it was held that there could be no danger of fraud or perjury in carrying it into execution; and therefore the performance of it was ſpecifically decreed, unleſs the ſtatute was ſpecially pleaded and relied upon as a bar. In recent caſes, the Court of Chancery has ſhewn a diſpoſition to be leſs ſtrict, with regard to the mode of taking advantage of the ſtatute, and it ſeems to be the prevalent opinion, that it is ſufficient to claim the benefit of the ſtatute in the anſwer; but the point is not abſolutely ſettled. In caſe a defendant does not claim this benefit, in his anſwer to an original bill, he will not be allowed it by making ſuch claim in anſwer to an amended bill. See *Cooth* v. *Jackſon*, 6 *Veſ.* 12, and the caſes there cited. *Spurrier* v. *Fitzgerald*, *ib.* 548. If the defendant denies that any parol agreement ever took place, a court of equity will not inquire into the truth of that denial, *Cooth* v. *Jackſon*, *ub. ſup.*

Where the agreement has been in part performed, and is ſufficiently eſtabliſhed, the ſtatute is in equity deemed not to apply (*a*); but acts alleged to conſtitute a partial performance, muſt appear to

(*a*) In *Foſter* v. *Hale*, 3 *Veſ.* 712. Sir *R. P. Arden*, Maſter of the Rolls, intimated it as his opinion that the court had gone rather too far in permitting part-performance and other circumſtances, to take caſes out of the ſtatute, and then unavoidably perhaps, after eſtabliſhing the agreement, to permit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of ſome agreement but of what muſt be left to parol evidence. He always thought the court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compenſation. Thoſe caſes are very diſſatisfactory; it was very right to ſay the ſtatute ſhould not be an engine of fraud, therefore, compenſation would have been very proper. They have therefore gone further, ſaying, it was clear there was ſome agreement and letting them prove it; but how does the circumſtance, of a man having laid out a great deal of money, prove that he is to have a leaſe for 99 years? The common ſenſe of the thing would have been to let them bring an action for the money.—In a former caſe Lord *Loughborough* ſaid, the bent of his mind was ſtrongly in favour of the wiſdom of the ſtatute, and therefore he was ſtrongly againſt all the caſes which had intrenched upon it. *Mortimer* v. *Orchard*, 2 *Veſ. Jun.* 243.

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have been done on account of the agreement. What acts ſhall or ſhall not be conſidered, as amounting to ſuch a partial performance, has been the ſubject of conſiderable diſcuſſion; the general reſult of which I ſhall ſtate in the language of Mr. *Fonblanque*. "The general rule is that the acts muſt be ſuch as could be done with no other view or deſign than to perform the agreement, and not ſuch as are merely introductory or ancillary to it. The giving of poſſeſſion is therefore to be conſidered as an act of part-performance, but giving directions for conveyances, and going to view the eſtate, are not; payment of money is alſo ſaid to be an act of part-performance. But it ſeems that payment of a ſum by way of earneſt is not (*a*).

The act of marriage is not, in itſelf, ſufficient to diſpenſe with any promiſe, in conſideration of ſuch marriage being in writing; the oppoſite conſtruction would neceſſarily be a repeal of the ſtatute, becauſe a marriage muſt actually take place before the ſtatute can apply.

I am not aware that there are any direct authorities to ſhew that this partial performance can be taken advantage of in a court of law. It may be contended, that the practice adopted upon the ſubject is founded upon circumſtances peculiar to the power of courts of equity, in awarding a ſpecific performance, though there are incidental opinions to the contrary (*b*).

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(*a*) Since writing the above it was held by Lord *Loughborough*, that paying five guineas in part of one hundred guineas to bind the bargain, and in part of the purchaſe money, was not a part-performance to take a contract out of the ſtatute. *Main* v. *Milbourn*, 4 *Veſ.* 720: and in a recent caſe, it was ruled by the Maſter of the rolls, that a purchaſer of an eſtate by auction, did not, by paying part of the auction duty, purſuant to the conditions of ſale, loſe the benefit of the ſtatute. *Buckmaſter* v. *Harrop*, 7 *Veſ.* 341. He obſerved further, that "even if the payment of the purchaſe money could be conſidered as part of the price, he did not ſee how that could bind the purchaſer. In general, the party ſeeking performance, muſt ſhew a performance on his ſide, as a reaſon for the interference of the court in his favour; for the ground upon which the court acts is, fraud, in refuſing to perform after performance by the other party. In *Lewin* v. *Martin*, 3 *Atk.* the purchaſer had paid a conſiderable part of the purchaſe money, and therefore it was a fraud to refuſe performance in the other ſide. In *Whaley* v. *Bagenett*, 6 *Bro. P. C.* 45, which being before the Houſe of Lords, muſt ſuperſede the authority of every other caſe, it was held that the acts done by the defendant, did not entitle the plaintiff to have the agreement ſpecifically performed."

It muſt however be clear that an act done, merely by one party, cannot give him a title againſt the other; and wherever ſuch act does induce a right, the concurrence, encouragement, or acquieſcence of the other party, muſt be neceſſarily ſuppoſed.

(*b*) In *Brodie* v. *St. Paul*, 1 *Veſ. Jun.* 333. Mr. Juſtice *Buller*, ſitting for the Lord Chancellor ſaid, that as to part-performance, courts of law have lately adopted the ſame ſort of reaſoning that prevails in courts of equity, that there can be but one true conſtruction of the ſtatute of frauds; whatever it is, it ought equally to hold in courts of law, and of equity, and that if it is ſettled in equity, that part-performance takes it out of the ſtatute, the ſame rule ſhould hold at law. Lord *Eldon*, in *Coath* v. *Jackſon*, 6 *Veſ.* 29, adverting to this opinion ſaid, he had had reaſon to think the character of the law of this

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The learned and judicious writer juſt referred to, ſuggeſted ſome important difficulties which may ariſe where the acts alleged to conſtitute a partial performance are admitted to be done; but the agreement upon which they are ſuppoſed to be founded, and conſequently their application to ſuch agreement is denied; or on the other hand, where the agreement is admitted, and the acts of performance denied, but, as he admits, without ſuggeſting the means to remove or leſſen them (*a*).

A letter admitting the agreement, and ſigned by the party, is held ſufficient to ſatisfy the requiſites of the ſtatute, but it muſt contain the preciſe terms of the contract, *Prec. Ch.* 560; or refer to another paper, which contains thoſe terms, *Vid. Tawney* v. *Crowther*, 3 *Bro. Ch.* 318. *Forſter* v. *Hale*, 3 *Veſ.* 696. And in the caſe of *Brodie* v. *St. Paul*, 1 *Veſ. Jun.* 326, where the agent of the defendant read to the plaintiff a paper reſpecting a propoſed leaſe, and an agreement was drawn up in reference to that paper, and the plaintiffs' bill prayed a performance of the agreement, according to the clauſes that had been read to him, Mr. *J. Buller* ſaid, that if the agreement is certain, and explained in writing ſigned by the parties (*b*), that binds them; if not, and evidence is neceſſary to prove what the terms were, to admit it, would effectually break in upon the ſtatute, and introduce all the miſchief, confuſion, and uncertainty that the ſtatute was intended to prevent; the only thing to ſupport this caſe would be to prove by parol evidence, which of the covenants were read, and which were not: that is directly prohibited by the ſtatute.

It muſt likewiſe appear that the other party accepted the terms, and acted in contemplation of them; if therefore, the huſband claiming the benefit of the promiſe contained in a letter, was igno-

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country, dividing itſelf into diſtinct courts of law and equity, had ſuffered more by courts of law acting upon what they conceive to be the rules of equity, than by any other circumſtance. If you addreſs yourſelf to the queſtion, how courts of law are to execute the equitable juriſdiction upon this queſtion, it is abſolutely impoſſible they can exerciſe it. His Lordſhip then proceeded to ſhew that a court of equity cannot act againſt the defendant's denial of the agreement, whereas in every caſe, a court of law is to underſtand that a defendant does deny it. Subſequent to the opinion above expreſſed, by Mr. Juſtice *Buller*, the courts of law have, in ſeveral inſtances, ſhewn a ſtrong diſinclination to aſſume the juriſdiction, naturally belonging to a court of equity; and as courts of equity have themſelves ſhewn, in recent caſes, ſo ſtrong an opinion upon the original deviation from the ſtatute, I think it moſt probable that parol evidence of an agreement, and of the part-performance of it, would not now, in an action at law, be allowed to take a caſe out of the ſtatute.

(*a*) The ſeveral caſes in which verbal agreements have been enforced, notwithſtanding the ſtatute of frauds, are (ſo far as they come down) accurately collected in Mr. *Powell's* Law of Contracts. See alſo the note to *Pym* v. *Blackburn*, 3 *Veſ.* 34.

(*b*) But in *Tawney* v. *Crowther*, the agreement referred to, and enforced, was not ſigned,

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rant of it at the time of the marriage, equity will not decree upon it, *Ayliffe* v. *Tracy*, 2 *P. Wms.* 65, neither will equity decree a portion upon a promiſe in a letter, if the defendant appear in the ſame letter to have endeavoured to prevent the marriage, though he was afterwards preſent at it. *Douglas* v. *Vincent*, 2 *Vern.* 202. It is a queſtion whether courts of equity will decree an agreement, entered into by letter, if a deed appear to have been afterwards framed, (but not executed) varying the terms expreſſed in that letter, or if the terms be varied, by a diſtinct ſubſequent parol agreement, partly carried into execution (*a*).

In a very late caſe before the Court of King's Bench, it was held, that a promiſe in writing to pay the debt of another was not ſufficient, as it did not ſtate the plaintiff's forbearance, which was the conſideration of it; ſince the ſtatute requires the agreement (not merely the promiſe), or ſome note or memorandum of it, to be in writing; and the agreement is that which each party is to do or perform, and by which both parties are to be bound; for without the parol evidence, the defendant cannot be charged upon the written contract, for want of a conſideration in law to ſupport it; and the effect of the parol evidence is to make him liable, when the ſtatute was paſſed with the very intent of avoiding ſuch a charge, by requiring that the agreement, by which muſt be underſtood the whole agreement, ſhould be in writing, *Wain* v. *Walter*, 5 *Eaſt*, 10.

It has been held to be a ſufficient ſigning, if a perſon knowing the contents of a deed, ſign it as witneſs only. 3 *Atk*, 503. (*a*) *Vid. Fonblanque*, B. I. c. 3. ſ. 10.

The mere peruſing and altering a draft, or putting a deed into a ſolicitor's hands, to prepare a conveyance, is not ſufficient to diſpenſe with the ſignature of the party, *Hawkins* v. *Holmes*, 1 *P. Wms.* 770. *Redding* v. *Wilkes*, 3 *Bro. Ch.* 400. In a late caſe it was contended, that a perſon by writing looſe inſtructions for a formal contract, comprizing his own name, as "Mr. *Stokes*, to repair, &c." amounted to a ſufficient ſignature. It was properly held, that the ſignature required by the ſtatute, was to have the effect of giving authenticity to the whole inſtrument; and where the name

(*a*) A parol variation to a written agreement, cannot be enforced in equity, *Cookes* v. *Maſcall*, 2 *Vern.* 34. In fact ſuch a ſubſequent agreement is not leſs within the object of the ſtatute, than an original agreement; and the ſame rule with reſpect to part performance, or other circumſtances preventing the operation of the ſtatute, ought equally to be applied in the one caſe and in the other. See *Robſon* v. *Collins*, 7 *Veſ.* 130, and the next ſection of this Appendix.

(*b*) This is contrary to the ſpirit of the deciſion in *Stokes* v. *Moor*, *infra*, and I think alſo contrary to the principle of the ſtatute.

was inſerted in ſuch a manner as to have that effect, it did not much ſignify in what part of the inſtrument it was to be found. But it could not be imagined that the name inſerted in the body of an inſtrument, and applicable to particular purpoſes, could amount to ſuch an authentication as the ſtatute required. *Stokes* v. *Moore*, *Cox's* 1 *P. Wms.* 770. *n.*

A perſon who has himſelf ſigned an agreement cannot object that it was not ſigned by the other party, as is clearly ſettled by a ſeries of caſes from *Hatton* v. *Gray*, 2 *Ch. Ca.* 164. to *Seton* v. *Slade*, 7 *Veſ.* 265. This is a ſtrong illuſtration of the principle, that the writing required by the ſtatute is only the evidence, and not the eſſence of the contract; for it is an eſtabliſhed rule that reciprocal contracts are not obligatory, unleſs both parties are equally bound.

In *Simon* v. *Metivier*, 1 *Bl.* 599. 3 *Burr.* 1921, an opinion was intimated in general terms, that the ſtatute did not extend to ſales by auction, but the caſe related to a ſale of goods, the proviſion reſpecting which will be ſtated in a ſubſequent paragraph; and it is now ſettled that no ſuch exception can be made with reſpect to land, and that the agent of the ſeller writing, does not prevent the operation of the ſtatute. See *Walker* v. *Conſtable*, 1 *Boſ.* & *Pul.* 306. *Buckmaſter* v. *Harrop*, 7 *Veſ.* 341.

In regard to the proviſion, that all leaſes of lands for a longer term than three years, ſhall only have the effect of eſtates *at will*; it has been held that, as eſtates at will are now only notional, and the payment of an annual rent conſtitutes a tenancy from year to year; the ſame effect ſhall be given to agreements for leaſes, which cannot operate to their full extent in conſequence of the ſtatute. *Vid. Clayton* v. *Blakey*, 8 *T. R.* 3. It has been alſo held that the other parts of the agreement, ſuch as the amount of the rent, the days of entry, the liability to taxes and repairs, ſhall be applied to ſuch tenancy from year to year, *Doe dem. Rigg* v. *Bell*, 5 *T. R.* 471.

The proviſion reſpecting agreements not to be performed within a year, does not extend to thoſe which depend upon ſome uncertain event, which may or may not happen within that time, as death, marriage, the arrival of a ſhip; but only to ſuch as in their nature and creation, are neceſſarily to be poſtponed to a more diſtant period. *Anon.* 1 *Salk.* 280. *Smith* v. *Weſtall*, 1 *Ld. Raym.* 316. *Fenton* v. *Emblers*, 3 *Burr.* 1278.

The deciſions reſpecting the liability of a perſon to anſwer for the debt, default, or miſcariage of another, have drawn the line between undertakings as a principal, and as a ſurety; and which are denoted by the terms original and collateral undertakings. Where the whole obligation is confined to the perſon making the

promiſe, though in reſpect of the benefit to another perſon; as if I direct a tradeſman to furniſh goods to my friend, and place them wholly to my account, the ſtatute does not attach. *Bourkemire* v. *Darnell*, 1 *Salk.* 27; but where the undertaking is only for better ſecurity; as a promiſe, that if the tradeſman will furniſh him with the goods, if he does not pay for them I will, it is void; it being clearly ſettled, that if the perſon for whoſe benefit the contract is made, is anſwerable at all, the other is wholly exempt; whether the promiſe is before or after the delivery of the goods, is perfectly immaterial. See *Maſon* v. *Wharam*, 2 *T. R.* 80. The converſe of this propoſition muſt neceſſarily be true, and if it manifeſtly appears that the party undertaking is anſwerable, it is concluſive evidence that the other perſon is not. In the above mentioned caſe of *Bourkemire* v. *Darnell*, it was ruled that a promiſe, that a third perſon who hired a horſe ſhould return him, was within the ſtatute.

The ſtatute has been held not to extend to a promiſe of making a ſpecific ſatisfaction for an injury; as where an action for an aſſault was about to be tried, and a friend of the defendant agreed to pay the plaintiff a ſum of money, to withdraw his proceedings; the promiſe, though not in writing, was adjudged to be obligatory. *Read* v. *Naſh*, 1 *Wilſ.* 305. But almoſt immediately afterwards, it was held that a promiſe, under ſimilar circumſtances, to pay an actual ſubſiſting debt could not be ſupported, as being contrary to the expreſs proviſion of the ſtatute. *Fiſh* v. *Hutchinſon*, 2 *Wilſ.* 94.

Where the perſon who makes the undertaking, is intereſted jointly with others, his engagement is binding; the ſtatute only applies to thoſe promiſes which are made wholly on account of another. *Stephenſon* v. *Squire*, 5 *Mod.* 213. *Comb.* 362.

A broker in poſſeſſion of goods about to be ſold, promiſed the landlord, if he would deſiſt from diſtraining them for arrears of rent, he would pay the rent, and this caſe was held not to be within the ſtatute. It was conſidered that the goods were the fund upon which the landlord had a lien, and that the broker became the bailiff of the landlord. *Williams* v. *Leper*, 3 *Burr.* 1886. And in a late caſe, where *A.* who had accepted bills for *B.*, and held polices of aſſurance for his indemnity, gave up ſuch bills to *C.* upon his promiſe to ſatisfy the acceptances, it was held that the promiſe of *C.* was not within the ſtatute; and the caſe was conſidered as a purchaſe by the defendant, of the plaintiff's intereſt in the policies. *Catling* v. *Aubert*, 2 *Eaſt*, 325.

It is clearly eſtabliſhed, that mutual promiſes to marry are not within the proviſion reſpecting promiſes in conſideration of marriage.

By ſ. 7. it is provided that all declarations, or creations of truſts, or confidences of any lands, ſhall be manifeſted and proved by ſome writing ſigned by the party, who is by law enabled to declare ſuch truſt, or by his laſt will in writing, or elſe they ſhall be utterly void; provided, that where any conveyance ſhall be made of any lands or tenements, by which a truſt or confidence ſhall ariſe, or reſult by the implication or conſtruction of law, ſuch truſt ſhall be of the like force and effect, as if the ſtatute had not been made. *ſ.* 8.

With reſpect to the principle which has been adopted, upon the firſt of theſe clauſes; the fulleſt information is to be derived from the caſe of *Forſter* v. *Hale*, 3 *Veſ. Jun.* 696, in which it was held that an agreement for one perſon to be truſtee for others, might be made out by letters in which he admitted himſelf to be ſuch; and that according to the true meaning of the ſtatute, it is ſufficient if it appears in writing, under the hand of a perſon having a power to declare himſelf a truſtee; and that is equivalent to a formal declaration of truſt. The Maſter of the Rolls obſerved, that it is not required that the truſt ſhould be created in writing, and the words of the ſtatute in this clauſe are very particular. It does not by any means require that all truſts ſhould be created only in writing, but that they ſhall be manifeſted and proved by writing, plainly meaning, that there ſhould be evidence in writing, proving that there was ſuch a truſt. Therefore, unqueſtionably it is not neceſſarily to be created in writing, but it muſt be evidenced by writing, and then the ſtatute is complied with; and indeed the great danger of parol declarations, againſt which the ſtatute was intended to guard, is entirely taken away. In the particular caſe, his Honor, from ſeveral letters and papers, inferred an agreement that the leſſee of a colliery, took it on account of himſelf and other perſons, with whom he was engaged in partnerſhip in a bank.

The common caſe of truſts by operation of law is, where an eſtate is purchaſed by one man, and the money paid for it by another. See the caſes cited, 3 *Veſ.* 765. Where a perſon purchaſed an eſtate in his own name, and inſiſted in anſwer to a bill, alleging that the purchaſe was made as agent for another perſon, that it was made on his own account; Lord *Northampton* refuſed to admit parol evidence of ſuch agency, in oppoſition to the defendant's anſwer; but ſaid, that if the plaintiff had paid any money, it would have been a reaſon with him to admit the evidence. See *Bartlett* v. *Pickerſgill*, 5 *Eaſt*, 577. *n.* The defendant was afterwards convicted of perjury, upon his denial of the truſt, and a petition was preſented to the Lord Chancellor for a rehearing of the cauſe, but was refuſed.

Where a truſtee purchaſes lands with the truſt money, and takes a con-

a conveyance in his own name, a truſt will reſult, and evidence may be given, *aliunde*; that the purchaſe was made with truſt money, although denied by the defendant's anſwer. *Balguy* v. *Hamilton*, *Ryal* v. *Ryal*, cited in *Lane* v. *Dighton*, *Ambler*, 409. *Vid. Fonblanque's* notes, *Treatiſe of Equity*, B. II. c. 5. ſ. 1.

The ſtatute alſo provides, that no contract for the ſale of goods for the price of ten pounds or upwards, ſhall be allowed to be good, except the buyer ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the bargain, or in part of payment, or that ſome note in writing be made and ſigned by the parties to be charged, or their agents. ſ. 17.

A perſon having ordered a carriage, when it was made, refuſed to take it; and this was held not to fall within the proviſions of the ſtatute, *Towers* v. *Oſborne*, 1 *Str.* 506, and afterwards, upon the authority of that caſe, it was decided that the ſtatute did not apply to a purchaſe of corn, which was to be thraſhed before it was delivered, *Clayton* v. *Andrews*, 4 *Bur.* 2101. Theſe caſes profeſſed to proceed upon a doctrine, that the ſtatute only relates to contracts for the ſale of goods, where the buyer is immediately anſwerable without time given, and the ſeller is to deliver the goods immediately. That doctrine is now completely exploded. Lord *Loughborough*, when Chief Juſtice of the Common Pleas, truly obſerved, that it was ſingular an idea ſhould ever prevail, that the ſtatute in this reſpect was only applicable to caſes where the bargain was immediate; and that it would not be of much uſe unleſs it were to extend to executory contracts; for it is from bargains to be completed at a future period, that the uncertainty and confuſion would probably ariſe, which the ſtatute was deſigned to prevent. He alſo ſaid, that preventing perjury was not the ſole object of the ſtatute; another object was to lay down a clear and poſitive rule, to determine when the contract of ſale ſhould be completed. Something direct and ſpecific is to be done, that there may be no room for doubt or heſitation; *Rondeau* v. *Wyatt*, 2 *H. Bl.* 63. 1 *H. Bl.* 63. The Court of King's Bench have alſo adopted this reaſoning, and held that delivering a ſample of corn to a purchaſer, could not diſpenſe with the requiſites of the ſtatute, *Cooper* v. *Elſton*, 7 *T. R.* 14. But it was agreed that the previous caſes, though accompanied by inſufficient reaſoning, were properly decided; and that the ſtatute is only applicable to mere contracts of ſale, and not to thoſe which in any degree conſiſt of labour to be performed, as the building a carriage, or the threſhing of corn.

Upon a ſale of goods by auction, the auctioneer put down in the uſual manner the name of the buyer, who came the next day

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and ſaw the goods weighed. It was held that the auctioneer was agent for the buyer as well as the ſeller, and that ſetting down his name was ſufficient to take the caſe out of the ſtatute, that the coming the next day and ſeeing the goods weighed, was very material; and an opinion was ſtrongly intimated, that ſales by auction were not within the ſtatute, *Simon* v. *Metivier*, 3 *Burr.* 1921. 1 *Bl.* 598.

It may be fairly agreed that the weighing off was an effective delivery, and that this is a true foundation for the deciſion; but that entering the name by way of memorandum, and without any intention at the time, of conſidering that as an authentication by the ſignature of the party, or that ſales by auction ſhould be deemed an excepted caſe, are points which ſeem extremely diſputable, eſpecially ſince the ſtatute of frauds has been regarded in a more favourable point of view, than it was by the judges who concurred in that determination. Sales by auction, and the delivery of a ſample, or other token in confirmation of the ſale, are caſes which it might have been very reaſonable to except; but the introducing implied exceptions, unleſs the implication is neceſſary to avoid a manifeſt abſurdity of conſtruction, is always attended with conſequences infinitely more detrimental, than the particular inconveniences which it might occaſionally prevent.

In a caſe which has occurred in the Court of Common Pleas, ſince making the above obſervations, it appeared that goods had been ordered from the defendants, who delivered a bill of parcels, intitled Mr. ———, Bought of *Jackſon* and *Hankin*, which words were printed at the top, and that the defendants wrote a letter wiſhing to know when the order ſhould be delivered; the caſe was ruled to be out of the ſtatute. The court ſeemed to think that the printed name at the top was a ſufficient ſignature; but decided, that as the Jury had connected the letter which did not ſtate the terms of the contract, with the bill of parcels which did, the caſe was clearly taken out of the ſtatute. *Sanderſon* v. *Jackſon*, 2 *Boſ.* and *Pul.* 238. But ſurely with reſpect to the firſt point, (to uſe, with a ſlight variation, the terms of Lord Ch.Baron *Eyre*, in *Stokes* v. *Moore*,) a name inſerted at the [top], of an inſtrument, and applicable to a particular purpoſe, could not be [intended to be] ſuch an authentication as the ſtatute required. As to the ſecond point, although the letter certainly referred to the contract, it ſeems very doubtful whether it was intended to refer to the particular written evidence of the terms of ſuch contract; and certainly it could not be collected from the letter itſelf, that there was any other writing to which a reference could be made. The point does not ſeem to have been

diſtinctly

diſtinctly put to the jury, and as this part of the caſe is wholly decided upon the foundation of the jury having found ſuch reference, the caſe amounts, as an authority, to no more than that the evidence in queſtion was ſuch, as it was proper to leave to the jury upon the point, whether the reference to the previous writing was intended or not.

Where a defendant agreed to buy a ſtack of hay, and afterwards contracted for the ſale of it to another perſon, who contrary to his direction had cut and taken part of it away, the jury found that there had been an acceptance by the defendant; which opinion the court confirmed. Lord *Kenyon* ſaid, that where goods are ponderous, and incapable of being delivered from one to another, there need not be an actual delivery, but it may be done by that which is tantamount; ſuch as the delivery of the key of a warehouſe in which the goods are lodged, or by delivery of other *indicia* of property; and there the defendant, by ſelling part of the property to another perſon, dealt with it as if it was in his own poſſeſſion, *Chaplin* v. *Rogers*, 1 *Eaſt*, 192.

It has been ruled that if an entire promiſe is made by parol, part of which is within the ſtatute of frauds, and part not (as a promiſe in conſideration of forbearance, to pay part of the debt of another and certain charges which have been incurred, in calling meetings of creditors), the whole is void, *Chater* v. *Beckett*, 7 *T. R.* 201.

I ſhall have occaſion in the following ſection, to make ſome further references to this ſtatute, with regard to points connected with the general rule, reſpecting the explanation of written agreements by parol.

SECTION VIII.

Of explaining Written Evidence by Parol.

It is an eſtabliſhed principle of the law of evidence, that verbal communications ſhall not be allowed to explain written agreements. The expoſition of this principle in the text, ſhews a very conſiderable conformity between the law of *France* and that of *England*.

The rule or principle in queſtion, is ſometimes conſidered as originating from the ſtatute of frauds, a ſuppoſition for which there is no fair foundation. That ſtatute is limited in its operation to particular ſubjects; it avoids, in reſpect to thoſe ſubjects, the common effects ariſing from a verbal communication; rendering it neceſſary that the tranſactions ſhould be reduced to writing; and having no direct relation to an explanation of the writing by parol.

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The rule in queſtion, is general, and has no relation to the original neceſſity of the act being reduced into writing; but it exiſted in the law prior to ſuch neceſſity being in any caſe introduced (*a*), and the effect of it is to exclude thoſe dangers of miſrepreſentation from verbal teſtimony, which is the natural inducement of reſorting to writing at all.

Where there are general heads, or minutes, not purporting to contain the entire ſubſtance of a tranſaction, I conceive that as a common rule, every verbal communication not inconſiſtent with the written minutes may be allowed; but if the caſe falls within the ſcope of the ſtatute of frauds, the ſame neceſſity which exiſts in reſpect to a writing in general, requires that that writing ſhall be perfect and comprize the entire ſubſtance, and excludes that explanatory evidence, by verbal communications of notes otherwiſe imperfect or unintelligible, which would be expoſed to all abuſes that the ſtatute was intended to prevent.

Therefore, as we have ſeen in the laſt ſection, an agreement referring to ſuch parts of another inſtrument, *as had been read* by the one party to the other, was held to be within the prohibition of the ſtatute, as it was imperfect without verbal evidence, but an inſtrument which is conformable to the ſtatute, may by reference include the contents of another writing, which is not ſo, as was admitted in the ſame caſe, *Brodie* v. *St. Paul*, 1 *Veſ. Jun.* 326.

Where a blank was left in a will for the name of a legatee, parol evidence to ſhew who was intended was diſallowed, *Bathie* v. *Attorney General*, *Bull. N. P.* 298. 2 *Atk.* 240.

So where a teſtatrix made a diſpoſition in favour of Lady ——— by a will which contained other proviſions for the benefit of Lady *Hort*, Lord *Thurlow* held, that he could not ſupply the blank by parol evidence, and ſaid that if there was only a title given, it was the ſame as if it was a total blank, and that by a blank added to a general legacy, no perſon is referred to (*b*).

The recent caſe of *Wain* v. *Walters*, 5 *Eaſt*, 10, mentioned in the laſt ſection, in which it was held that a promiſe in writing to pay the debt of another was void, as within the ſtatute, for not expreſſing the conſideration of the promiſe, and that the

(*a*) See *Woollam* v. *Hearn*, 7 *Veſ.* 211. cited *poſt*.

(*b*) In *Abbott* v. *Maſſie*, 3 *Veſ.* 148, upon a legacy to Mrs. *G.* Lord *Loughborough*, referred it to the Maſter to receive evidence, but legal evidence, who Mrs *G.* was, but ſaid he did not mean to tell the Maſter what evidence he was to receive. This caſe can hardly be reconciled with the two preceding, or I conceive with the true conſtruction of the ſtatute; an initial letter, morally ſpeaking, is almoſt as indefinite as an abſolute blank; and in all probability there are more perſons whoſe ſurnames begin with the letter *G.*, than who are diſtinguiſhed by a title.

agreement

agreement of forbearance which was the conſideration of the promiſe, could not be ſhewn by parol, is alſo referable to this diſtinction.

But where a blank was left in the biſhop's regiſter, of the name of a patron who preſented to a church, it was allowed to ſupply the omiſſion by parol teſtimony, for the preſentation might have been by parol, and therefore it was not in effect to make that paſs by parol, which the law requires to be done by writing, *Biſhop of Meath* v *Lord Belfield*, 1 *Wilſ.* 215. The reaſon here given ſupports the diſtinction for which I contend; the caſe itſelf is referable to a different principle, for the evidence was, not to explain a writing, but to prove a matter of fact, of which there was not any written evidence; for the blank rendered every thing which was ſaid about the perſon preſenting nonſenſe, and the only thing proved by the writing was the name of the clerk preſented.

In conformity to the ſame principles, where verbal declarations were made reſpecting the intention of adhering to a will, concerning which the principal queſtion was, whether it was revoked by a ſubſequent marriage, and the birth of a poſthumous child; Lord *Kenyon* diſclaimed paying any attention to thoſe declarations, becauſe letting in that kind of evidence, would be in direct oppoſition to the ſtatute of frauds, which was made in order to prevent any thing depending on either the miſtake or the perjury of a witneſs, *Vid. Lancaſhire* v. *Lancaſhire*, 5 *T. R.* 49.

There are ſome caſes reſpecting the queſtion, how far a written agreement may be varied by a ſubſequent agreement by parol, *Cooke* v. *Maſcal*, 2 *Vern.* 34. *Jordan* v. *Sawkins*, 1 *Veſ. Jun.* 402. 3 *Bro. Ch.* 388. *Robſon* v. *Collins*, 7 *Veſ.* 130. The expreſſions in ſome of theſe caſes appear to be general, as referable to all written agreements, whereas it ſeems clear, that a diſtinction ought to be made with reſpect to caſes, the ſubjects of which do or do not fall within the ſtatute of frauds: and in fact in all the caſes mentioned, the ſubjects in queſtion were within the ſcope of the ſtatute, and whenever that is the caſe it ſhould ſeem, that the ſame proviſion which requires a writing originally, would alſo require a writing in caſe of variation; for an agreement varying the obligations ariſing from a former valid agreement, reſpecting a given ſubject, is as much an agreement reſpecting the ſubject as that firſt made, and requires the ſame formalities. But where an agreement is made in writing, without any legal neceſſity, and the whole might have originally reſted in parol, there is no reaſon why a diſtinct ſubſequent agreement of variation, ſhould not be as effectually made by parol, as the original agreement might have been: the variation

variation of a former ſubſiſting agreement, is itſelf an original agreement, though relative to the ſubject of an anterior ſtipulation, and whatever is neceſſary or ſufficient for the validity of the firſt agreement, ought equally to be ſo for the ſecond. There is nothing in this opinion which militates againſt the rule at preſent under conſideration. The object and principle of the rule is, that an act which, upon the face of it, purports to be a memorial of the full intention of the contracting parties, ſhall not, by other evidence of an inferior nature, be ſhewn not to be ſo; but the admiſſion of evidence of any ſubſequent agreement is perfectly conſiſtent with the ſuppoſition and concluſion of the law, that the written memorial is a full and correct repreſentation of the tranſaction which it profeſſes to ſtate.

The true extent and nature of the rule ſeems to be the prevention of any evidence, which would qualify, vary, or (in caſe of apparent ambiguity) explain by the collateral repreſentations of the parties, the effect and object of an inſtrument itſelf; but not the preclusion of other proof in reſpect to facts, of which the writing is merely evidence. If a releaſe which takes effect by its own intrinſic force and operation, is conceived in general terms, it is not open to proof that it was intended to be conditional or particular; but if there is a receipt for a particular ſum, or in full of all demands, that is merely evidence of a fact, and is open to contradiction or explanation. Thus it has been decided, that the ſurety for payment of an annuity, having joined in ſigning a receipt for the purchaſe money, might, in an action for the repetition of that money, the annuity being vacated, ſhew that no part of it was paid to him, *Stratton* v. *Raſtall*, 2 *T. R.* 364.

It is hardly neceſſary to multiply inſtances of caſes in which it has been held, upon the general rule, that no extrinſic evidence ſhall be allowed to vary the effect and purport of an inſtrument, from that which is to be collected upon the face of the inſtrument itſelf. To ſtate a few of them: In Lord *Irnham* v. *Child*, 1 *Bro.* 92. Lord *Portmore* v. *Morris*, 2 *Bro. Ch.* 219. *Hare* v. *Sherwood*, 1 *Veſ. Jun.* 241. 3 *Bro. Ch.* 368; a grantor of an annuity was not allowed to ſhew by parol evidence, that it was intended to be ſubject to redemption. So it has been held that no evidence could be allowed, that an agreement for a leaſe was to include more premiſes; or that a greater rent was to be paid than was actually expreſſed, *Meres* v. *Anſell*, 3 *Wilſ.* 275. *Preſton* v. *Merceau*, 2 *Bl. Rep.* 1249, and in *Woollam* v. *Hearn*, 7 *Veſ.* 211, cited in note *infra*, Sir *William Grant* ſaid, by the rule of law, independent of the ſtatute, parol evidence cannot be received to contradict a written

a written agreement. To admit it for the purpoſe of proving, that the written inſtrument does not contain the real agreement, would be the ſame as receiving it for every purpoſe, if was for the purpoſe of ſhutting out that inquiry, that the rule was adopted. Though the written inſtrument does not contain the terms, it muſt, in contemplation of law, be taken to contain the agreement, as furniſhing better evidence than any parol can ſupply.

In *Joynes* v. *Statham*, 3 *Atk.* 388. Lord *Hardwicke*, in oppoſition to a bill, for the performance of an agreement written in the hand of the plaintiff, for a leaſe to the defendant, admitted parol evidence, that it ought to have been inſerted in the agreement, that the rent was to be free from taxes. This deciſion proceeded chiefly upon the ground of fraud or miſtake; but he intimated that if the defendant had been the plaintiff, he did not ſee but he might have been allowed the benefit of diſcloſing this to the court, becauſe it was an agreement executory only, and as in leaſes there are always covenants relating to taxes, the Maſter will inquire what the agreement was as to taxes; and therefore, the proof offered here is not a variation of the agreement, but is explanatory only what thoſe taxes were. This latter obſervation is clearly only an incidental doctrine, and therefore is not cloathed with that high authority which naturally belongs to the judicial determinations of Lord *Hardwicke*. It is to be obſerved that the ſubject-matter is within the ſtatute of frauds, and therefore requires an agreement, and that a complete agreement in writing. Where an agreement reſpecting a leaſe, contains no proviſion reſpecting taxes or other incidental ſubjects, the law preſcribes the relative obligations of the parties, and to vary the operation of the law acting upon the agreement, would be attended with as great miſchiefs and inconveniences, as admitting parol evidence in ſupport of the claim for an augmentation or diminution of rent. And in *Rich* v. *Jackſon*, 4 *Bro. Ch.* 514, it was determined by Lord *Loughborough*, that parol evidence could not be received, to ſhew that a rent mentioned in a written agreement, was intended to be free from taxes; ſo as to ſupport a bill for the ſpecific performance of an agreement with that variation. His Lordſhip ſaid, that the hardneſs of the caſe, under ſpecial circumſtances, may induce the court to refuſe decreeing a ſpecific performance, or to leave it to the plaintiff's remedy at law; but it is quite impoſſible to permit the rule of law to be broke in upon; and that requires that nothing ſhould be added to the written agreement, unleſs in caſes where there is a clear ſubſequent independent agreement varying the former; but not where it is of matter paſſing at the ſame time with the written agreement.

agreement. The Court of Common Pleas had before refuſed to admit the ſame parol evidence in an action between the ſame parties, whilſt Lord *Loughborough* was Chief Juſtice.

The propoſition, that a writing is open to contradiction or explanation, in regard to evidence of matter of fact, connected with and evidenced by the writing, is confirmed by ſome deciſions of the Court of King's Bench, upon queſtions of ſettlement. The conveyance of an eſtate, expreſſed the purchaſe money to be leſs than 30*l.* by which no ſettlement would be gained, and evidence was held admiſſible to ſhew that a larger ſum had been paid. *Rex* v. *Scammonden*, 3 *T. R.* 474. Two perſons as church-wardens and overſeers of the poor of the pariſh of *A.*, gave a certificate that a pauper belonged to the hamlet of *B.* within that pariſh, and evidence was allowed that the hamlet was a diſtrict maintaining its own poor, and that the perſons giving the certificate were officers of the hamlet, not of the pariſh at large. *Rex* v. *Sanborn*, 3 *T. R.* 609. An agreement for the payment of a ſum of money upon entering into a written contract, was allowed to ſhew that the contract intended, was an apprenticeſhip ſo as to defeat a ſettlement, though the contract upon the face of it, might have only been for a ſervice, in which caſe the ſettlement would have been gained. *Rex* v. *Laindon*, 8 *T. R.* 379. (*a*)

And in a very recent caſe, an averment was ſuſtained that a charter-party, dated the 6th of *February*, containing a condition that the ſhip ſhould ſail on or before the 12th of *February*, was not executed until the 15th of *March*; whereby the performance of the condition was diſpenſed with. *Hall* v. *Azenove*, 4 *Eaſt*, 477. And if ſuch a fact can be averred in pleading, it is a neceſſary conſequence that it may be ſhewn in evidence, in caſes where no averment is requiſite.

Moſt of the caſes upon the annuity act, are inſtances of contradicting the ſtatement on the face of the deed, by extrinſic evidence.

The doctrine, that ambiguity in an inſtrument can only be ſolved by the contents of the inſtrument itſelf, and not by any verbal communications which took place at the time of making it, is confined to ſuch ambiguity as appears upon the face of the inſtrument itſelf, and not to that which ariſing from external evidence may by ſuch evidence be explained.

A caſe upon this ſubject aroſe from a teſtator having made a will, in which were diſpoſitions for ſeveral perſons, but only two wo-

(*a*) This caſe went rather farther in admitting evidence, that the perſon engaged was intended to be only employed in a particular trade.

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men were mentioned, his wife and his niece. And then he deviſed a particular eſtate to *her* for life. The Lord Chancellor refuſed to receive parol evidence, as to which of the two was meant. *Caſtleton* v. *Turner*, cited, 2 *Veſ.* 216.

The common illuſtration of the ſecond part of the poſition, is a deviſe by a name and deſcription equally applicable to two perſons, or places, in which caſe parol evidence will be received, as to which of them was mentioned and intended. Where a teſtator deviſed 100*l.* to *the four* children of Mrs. *Bamfield*, and after the intervention of ſeveral other legacies, gave 300*l.* to the children of Mrs. *B.*, and it appeared that Mrs. *B.* had four children by her huſband *B.*, and two by another huſband *P.*; a declaration by the teſtator that he had provided for the four children of Mrs. *B.*, but would give nothing to the *P's.*, was held by Sir *John Strange* Maſter of the Rolls, proper evidence as to the 100*l.* legacy, to ſhew which four were meant; being only explanatory, but inadmiſſible as to the 300*l.* given in general terms, becauſe contradictory; and it being urged that the evidence read was adapted to defeat the claim of the *P's.*, as to both legacies, his Honor ſaid, that it was the duty of the Court to diſtribute and divide, to regard it ſo far as it was apt and legal. Where not ſo, it was not binding. *Hampſhire* v. *Pierce*, 2 *Veſ.* 216.

Where a deſcription is partially applicable to two perſons, but totally to neither of them; (as an error in the redundant part of a deſcription will not be allowed to vitiate a deſcription otherwiſe ſufficiently explicit, and only applicable to a ſingle individual;) it has been held that this is ſuch a latent ambiguity as falls within the rule of admitting parol evidence, though in the particular caſe the evidence was not ſufficient to remove the ambiguity; and the will upon which it aroſe, was therefore held void for uncertainty. In that caſe the teſtator deviſed an eſtate to his grandaughter *Mary Thomas* of *L.*, in *M.* pariſh; having no grandaughter *Mary Thomas*, but a great grandaughter *Mary Thomas*, living at a different place, and a grandaughter *Elinor Evans*, living at the place deſcribed. *Thomas* v. *Thomas*, 6 *T. R.* 671.

Where an object is ſufficiently and correctly deſcribed, but the deſcription alſo contains ſomething further, which is erroneous; the diſpoſition, as I have juſt now had occaſion incidentally to obſerve, will be good notwithſtanding ſuch error. Thus if a grant is made to *William*, Biſhop of *Norwich*, when the name of the Biſhop is *Richard*, the grant is good, becauſe the intention is ſufficiently apparent. *Co. Lit.* So if a deviſe is made to *John*, the ſon of *J. S.*, and *J. S.* has only one ſon, whoſe name is *James*, there is a ſufficient diſpoſition in favour of the ſon of *J. S.*

Dowſett v. *Sweet*, *Ambler*, 175. A teſtatrix gave a ſixth of her effects to her niece *M. B.* for her life, and after her death one moiety to the niece's grandchildren, the children of her daughter *Mary*, the other moiety to the niece's daughter *Ann*; at the time of the will, the niece's daughter *Mary* was unmarried, but *Ann* was dead leaving iſſue; and the deviſe was conſtrued to be in favour of *Mary*, and the children of *Ann*. Mr. *Ambler* in reporting the caſe obſerves, that if there is a certain deſcription, and a further deſcription added, it is immaterial whether ſuch farther deſcription be true or falſe. *Bradwin* v. *Harpers*, *Ambler*, 374 (*a*). Alſo when property was given to *A.* and *B.*, legitimate children of ———, the perſons mentioned by name were allowed to take, though in fact they were not legitimate. *Standen* v. *Standen*, 2 *Veſey Jun.* 589 (*b*).

A deſcription which is in itſelf erroneous, and not corrected by the context, may confer a ſufficient title, provided the object intended is aſcertained by verbal teſtimony, and there is no other to which the deſcription is properly applicable. A very ſtrong inſtance of this occurred in a caſe, where a will purported to be made in favour of *Catharine Eardley*, and evidence was allowed to ſhew that *Gertrude Yardley* was the perſon meant; no ſuch perſon as *Catharine Eardley* appearing to claim the legacy. *Beaumont* v. *Fell*, 2 *P. Wms.* 141. Where a perſon who had had a brother *Edward*, then deceaſed, leaving children, and alſo a brother *William*, gave property to his brother *Edward*, it was held, upon evidence, that as he uſually called *William Edward* or *Ned*, *William* ſhould be allowed to take.

But where there is an exiſting ſubject, to which a deſcription may be properly applied, parol evidence cannot be allowed, that a different ſubject was intended. Upon this principle, when Lord *Orford*, who had made two wills, one dated in 1752, and another in 1756, afterwards, by a codicil, confirmed his laſt will dated in 1752; evidence that the codicil was intended to refer to the laſt ſubſiſting will, and that the other was brought from the perſon with whom

(*a*) I am aware that the caſes mentioned in this paragraph do not depend upon the rule which is the preſent ſubject of examination, but they are incidentally connected with it, and in ſome degree render the queſtions reſpecting the application of the rule in other caſes, more perſpicuous.

(*b*) In *Kennet* v. *Abbott*, 4 *Veſ.* 802. a woman made a will in favour of a perſon as being her huſband, who it afterwards appeared had another wife, and Sir *R. Arden*, Maſter of the Rolls, held the diſpoſition void. He admitted the general principle, that an erroneous deſcription does not vitiate a legacy otherwiſe valid; but ſaid, that under the circumſtances, he was warranted to make a precedent, and to determine that wherever a legacy is given to a perſon under a particular character, which he has falſely aſſumed, and which alone can be ſuppoſed the motive of the bounty, the law will not permit him to avail himſelf of it.

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it was depoſited, and the codicil added thereto upon a ſuppoſition that it was the laſt, and without its being read to him, was held to be inadmiſſible. Lord *Kenyon*, in delivering his opinion, after ſome obſervations concerning the effect of the evidence, ſaid, that the evidence propoſed did not introduce any latent ambiguity; and they ought not to let in parol evidence, which, if admitted, inſtead of explaining an ambiguity, would only introduce a looſe conjecture; but he diſclaimed forming his opinion on the effect of the evidence offered; he went upon this ground, that there was no latent ambiguity introduced by parol evidence, to let in the parol evidence which was tendered. *Lord Walpole* v. *Lord Cholmondeley*, 7 *T. R.* 138.

There is another claſs of caſes, where verbal evidence is allowed by courts of equity, to affect the operation of a writing, though the writing, upon the face of it, is not attended with any ambiguity. According to the technical phraſe applied to this ſubject, parol evidence is admitted to rebut an equity; the meaning of which is, that where a certain preſumption would, in general, be deduced from the nature of an act, ſuch preſumption may be repelled by the extrinſic evidence, ſhewing the intention to be otherwiſe. For inſtance, if a father by will gives a legacy to his child, and afterwards advances a portion to the ſame amount, the portion is preſumed to be intended as a ſatisfaction for the legacy; but evidence may be given even of verbal converſations, to ſhew a contrary intention. *Vi. Elliſon* v. *Cookſon*, 1. *Veſ. Jun.* 100 (*a*). So far the admiſſion of parol evidence is only for the qualification of an act, and not the explanation of a writing; but the ſame doctrine is applied to the caſe, where a teſtator gives his executor a legacy, and makes no diſpoſition of the reſidue of his effects. The general rule is, that an executor takes the reſidue when there is no expreſs diſpoſition; but as the giving a part is ſuperfluous, when the ſame perſon is intended to have the whole, the legacy induces a preſumption, that the general rule was not intended to operate, and that the reſidue is to be applied as in caſe of inteſtacy. Still this is only treated as a preſumption, and the contrary intention may be ſhewn by evidence of verbal declarations. It is too late for any practical purpoſes, to examine the reaſoning upon which this laſt diſtinction (which falls within the expreſſion of rebutting an equity) was introduced and eſtabliſhed; but it is certain that it is deduced from the civil law, in points where the civil law differs from the law of *England*; and the allowing a written inſtrument to derive a conſtruction different from that which it would naturally import, in conſequence, not of any relative character of the ſub-

(*a*) See alſo *Clinton* v. *Hooper*, 1 *Veſ. Jun.* 173.

ject, but merely of verbal declarations, cannot, on principles, be reconciled with the general tenor of our juriſprudence.

Evidence which is calculated to explain the ſubject of an inſtrument, is eſſentially different in its character, from evidence of verbal communications reſpecting it. It is a leading rule of conſtruction, that all acts are to be expounded according to the ſubject-matter. Whatever, therefore, is an indication of the nature of the ſubject, is a proper medium for conſtruing the contents of an inſtrument, and a juſt foundation for giving it a conſtruction, conſidered relatively, different from that which it would receive, if conſidered abſtractedly from the circumſtances with which it is connected. Thus, when a leaſe was made, amongſt other property, of a certain piece of ground, and the queſtion was, whether a cellar under that piece of ground was or was not included, evidence that at the time of the leaſe, the cellar in queſtion was in the occupation of another tenant was held admiſſible, to ſhew that it could not have been the intention of the parties that it ſhould paſs by the leaſe. *Doe* v. *Burt*, 1 *T. R.* 701.

With reſpect to wills, (the inſtruments which produce more queſtions of conſtruction than all others united,) Lord *Mansfield*, in *Baldwin* v. *Karver*, *Cowp.* 312, ſaid, all caſes on the conſtruction of wills depend upon the particular penning of the wills themſelves, and the ſtate of the families to which they relate. And in the famous caſe of *Jones* v. *Morgan* (*a*), his lordſhip ſaid, that to conſtrue a will, the intent is to be taken from the whole will together, applied to the ſubject-matter to which the will relates (*b*); and Lord *Loughborough*, quoting that opinion, took notice of different caſes in which certain words were

(*a*) Cited in *Lytton* v. *Lytton*, *infra*.

(*b*) Where a teſtator profeſſes by his will to diſpoſe of property, over which he in fact has not the power; and by the ſame will makes a valid diſpoſition of other property, to the perſon intitled to the firſt, that perſon cannot claim the benefit of the will in the one reſpect, without acquieſcing in it in the other; but is put to his election. It is alſo a general principle, that if a father who is under an obligation to provide certain portions for his children, makes a general diſpoſition in their favour by will, the preſumption is that this diſpoſition is not accumulative, but only raiſes a caſe of election. The following caſe occurred, with reſpect to admitting extrinſic evidence in the application of theſe rules. Dr. *Hinchcliffe*, afterwards biſhop of *Peterborough*, made a ſettlement under which his younger children were intitled to certain property. He afterwards made a will, with proviſions in favour of theſe children, who claimed the benefit, both of the will and the ſettlement. Sir *R. Arden*, Maſter of the Rolls (who obſerved with great truth, that he was as jealous of the rules of evidence as any judge who ever ſat in a court of equity,) admitted the evidence of an account which the teſtator made regularly, at firſt yearly, and afterwards half yearly, of the ſtate of his property;——to ſhew that he ſuppoſed and regarded the property included in the ſettlement as his own, obſerving that this was evidence, not for the purpoſe of explaining the will itſelf, for which it was clear that it could not be admitted, but to ſhew the circumſtances under which he made his will. *Hinchcliffe* v. *Hinchcliffe*, 3 *Veſ.* 516, and ſee the caſes there cited.

held to apply to a failure of iſſue at a certain period, though taking the words ſtrictly, and conſtruing them blindly, without conſidering the circumſtances, would have imported a general failure of iſſue, and the limitation attached to them would have been void; and ſaid, that the circumſtances of the teſtator and his family have always been taken into conſideration in theſe caſes. *Vid. Lytton* v. *Lytton*, 4 *Bro.* Ch. 1.

It will be unneceſſary to enumerate particular caſes, in which the ſituation of a family, or the deſcription of property (*a*) have according to this principle been taken into conſideration: the principle itſelf being allowed, the application of the inſtances is matter of conſtruction, and unconnected with the ſubject under diſcuſſion.

But though evidence may be material, as to the nature or deſcription of property, or as to the party having or not having property of a given character (*b*), evidence concerning the value or amount, falls under a different conſideration. In one caſe Lord *Mansfield* went into an inquiry of value, as the foundation for an argument that property of ſuch ſmall value could not be intended to be the ſubject of ſuch limitations, as a conſtruction one way would introduce. *Oates* v. *Brydon*, 3 *Bur.* 1895. But in a ſubſequent caſe, where evidence was offered of the value of an eſtate, charged with ſums of money for the ſiſters of the deviſee, in order to ſhew that, according to that value, there would be an equality of diſtribution, from which circumſtance the propriety of a particular conſtruction was inferred, his lordſhip, in concurrence with the other judges of the King's Bench, held that it was nugatory and inadmiſſible, and that it proved nothing at all; though it laid a circumſtance before the court, which might have had its weight if the Court were called upon to make a will for the teſtatrix. *Doe* v. *Fyldes*, *Cowp.* 833. And in *Goodtitle* v. *Edmonds*, 7 *T. R.* 635, Lord *Kenyon* ſaid, that in *Oates* v. *Brydon*, after the argument, and before the deciſion of the caſe, Lord *Mansfield* (certainly from the moſt earneſt wiſh to do juſtice between the parties) directed certain inquiries to be made, reſpecting the value of the eſtate deviſed, which at the time gave diſſatisfaction to the profeſſion, who thought that the rules of law ought to prevail in the conſtruction of the will, whether the eſtate deviſed by it were of the value of 20*l.* or of 2000*l. per annum*; but that he (Lord *K.*) believed that, in ſubſequent caſes, Lord *Mansfield* had doubted whether, in the deciſion of that caſe, he had proceeded upon ſubſtantial grounds.

(*a*) See the collection of caſes on this ſubject, *Powell on Deviſes*, 477.
(*b*) *Vid. Baugh* v. *Read*, *Veſ. Jun.* 260.

Lord *Loughborough* alſo, in a caſe which, in former ſtages had been before Lord *Thurlow* and Lord *Kenyon*, obſerved, that they had very properly refuſed an inquiry into the amount of the teſtator's property, at the time of his making his will, for it was too vague to calculate, that a man muſt be ſuppoſed to attach a contingent intereſt, not fairly to be deemed a property, merely becauſe his calculation, as to what he might die poſſeſſed of, had eventually failed. *Standen* v. *Standen*, 2 *Veſ. Jun.* 593.

Another circumſtance which may be taken into conſideration, for the expoſition of written inſtruments, is uſage. Every inſtrument, is preſumed, in its general terms, to refer to the known and eſtabliſhed uſage reſpecting the ſubject to which it relates, and ſhould be conſtrued accordingly. Therefore, upon policies of inſurance, though the literal or general import of terms might lead to one concluſion, the particular courſe of trade may warrant another. A general warranty to depart with convoy, may be qualified by joining convoy, at the neareſt uſual place of rendezvous, *Lethulier's* caſe, 2 *Salk.* 443. A policy on an *Eaſt India* voyage, may admit many things to be done in conformity to the uſage of that trade, which in caſes of an ordinary policy, conceived in the ſame terms, would be a deviation. *Salvador* v. *Hopkins*, 3 *Bur.* 1707. The cuſtomary mode of conducting the fiſhery at *Newfoundland*, was held to warrant ſimilar acts upon the newly eſtabliſhed fiſhery at *Labrador*. *Noble* v. *Kennoway*, *Doug.* 492. (*a*)

A ſailor having contracted for a voyage, upon a note for an entire ſum, during the courſe of it; it was ſuggeſted that it was cuſtomary, upon ſimilar occaſions, to make an apportionment; the reſult of an inquiry upon the ſubject, was not ſufficient to raiſe the principal queſtion upon the effect of ſuch uſage; but Lord *Kenyon* obſerved, that if the Court were aſſured that ſuch notes were in univerſal uſe, and that the commercial world had received and acted upon them in a different ſenſe, (from that which he inferred upon the particular conteſt,) he ſhould give up his own opinion; and the other judges expreſſed themſelves to the ſame effect. *Cutler* v. *Powell*, 6 *T. R.* 320.

The effect of local cuſtom was ſtrongly recognized in a caſe where a leaſe had been made for a given term, and it was held,

(*a*) See *Roberſon* v. *French*, 4 *Eaſt*, 130, in which Lord *Ellenborough*, applying himſelf to a ſuggeſtion, that there were peculiar rules for the conſtruction of policies of inſurance, ſaid, the ſame rule of conſtruction which applies to all other inſtruments, applies equally to a policy of aſſurance, that it is to be conſtrued according to its ſenſe and meaning, as collected, in the firſt place, from the terms uſed in it, which are to be underſtood in their plain ordinary and popular ſenſe, unleſs they have generally, in reſpect to the ſubject-matter, as by the known uſage of trade or the like, acquired a peculiar ſenſe, diſtinct from the popular ſenſe of the ſame words. See Lord *Eldon's* obſervations on this ſubject, *Anderſon* v. *Pilcher*, 2 *Boſ. & Pul.* 164.

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that the tenant might avail himſelf of a cuſtom in the pariſh, to take the way-going crop after the expiration of his term. It was ſaid, that the cuſtom did not alter or contradict the agreement in the leaſe, it only ſuperadded a right which was conſequential to the taking. *Wiggleſworth* v. *Dalliſon*, *Doug.* 201.

Evidence of uſage, however, ought not to be allowed to contradict the expreſs and unequivocal terms of a written inſtrument. The common form of a policy of inſurance expreſſes, that the inſurance on the ſhip ſhall continue until ſhe is moored twenty-four hours, and on the goods till ſafely landed. Lord *Kenyon* (contrary to his own opinion, and in deference to what was ſuggeſted to be the effect of former authorities) admitted evidence of a uſage, that the riſk on the goods, as well as the ſhip, expired in twenty-four hours; but the Court of King's Bench ruled, that the evidence was inadmiſſible, and granted a new trial. *Vid. Parkinſon* v. *Collier*, *Park. Inſ.* 314.

In *Donaldſon* v. *Forſter*, *Abbot* on Shipping 170. Lord *Kenyon*, in an action upon a charter-party, which ſtipulated that the merchant ſhould have the excluſive uſe of the ſhip and cabin, admitted evidence of its being the conſtant uſage, under ſuch charter-parties, to allow the maſter to take out a few articles for his private trade; and thinking the uſage proved, directed a verdict accordingly; but one of the jury diſſenting, the caſe was compromiſed. This caſe appears to me to be in direct oppoſition to that laſt mentioned, the terms of the inſtrument being in both caſes equally unequivocal; and I think it is alſo contrary to the genuine principles of law. In many caſes, a ſufficient diſtinction is not made between the uſage of courteſy, which in its eſſence is voluntary, ſuch as chriſtmas boxes, and giving money to chaiſe-drivers, and chamber-maids; and the uſage which, being attached to the nature or ſubject of a contract, forms a part of the contract itſelf, unleſs the poſitive expreſſions are inconſiſtent with ſuch a conſtruction; but in either caſe, where there is ſuch inconſiſtency, it would ſeem, according to the principles of accurate reaſoning, that the effect of uſage (the real character of which is only to ſupply an inference, for fixing the true conſtruction of general or ambiguous expreſſions) ſhould not be allowed to controul the expreſs proviſions of the contract. The following paſſage in *Valin*, B. 3. Tit. 3. Art. 22. is referable to the above diſtinction. "In caſe of long voyages, it has even become a uſage (*il eſt meme paſſé en uſage*) not to pay the freight until three months after the delivery of the goods; the motive of which uſage is to give the debtor of the freight a ſuitable time for paying it, by the ſale of his goods. It is true that this uſage does not make the law, and that whenever the owner, or maſter have demanded the freight within the

three months, the Admiralty has decided in their favour, without regard to this ſuppoſed uſage, which is only a matter of forbearance or courteſy."

I have known a learned judge decide at the aſſizes, that a maſter could not inſiſt upon his ſervant, who was hired for a year, remaining with him after giving a month's notice, or refuſe the payment of a proportionate part of his wages; it being common to engage with ſervants, ſubject to the liberty of parting upon a month's notice. But this appeared to me at the time (and the impreſſion has been confirmed by frequent reflection ſince) to be an inſtance of allowing the frequency of particular ſtipulations, or a habit generally acquieſced in for the ſake of mutual convenience and accommodation, improperly to controul the regular operation of the law upon the expreſs terms of a poſitive contract. In fact nothing can be more completely indefinite than the character and quality of that uſage which is allowed to give a definite character to other ſubjects. The uſage or local cuſtom, known to the common law, is as definite as a circle or triangle; but for diſtinguiſhing the uſage which has ſuch extenſive influence in modern practice, from acts which are the mere reſult of frequent convenience, careleſs acquieſence, impoſition or abuſe, no adequate criterion has been as yet eſtabliſhed. See ſome obſervations upon this ſubject, which I have extracted from the view of the deciſions of Lord *Manſfield*, in the following Number of this Appendix.

Contemporaneous and ſubſequently continuing uſage, with regard to the carrying of ancient inſtruments into execution, is alſo conſidered as proper evidence to explain doubtful words in the inſtruments themſelves. This kind of uſage is very different, in its principle, from that already adverted to; the one being referable to the antecedent nature of the ſubject, the other being merely evidence of the conſtruction and expoſition which have in practiſe been given to the particular inſtrument.

Mr. *Peake* takes notice, that the firſt inſtance which he finds of this doctrine, of explaining inſtruments by the uſage under them, being acted upon, is the caſe of the *Attorney General* v. *Parker*, 3 *Atk.* 576. In that caſe the preſentation to the curacy of *Clerkenwell*, was given by a deed about ninety years before to the pariſhioners and inhabitants. Lord *Hardwicke*, after taking notice of the extenſive ſignification which may be applied to each of theſe terms, ſaid, "Some ſort of limitation is allowed by both ſides, to have been put by uſage on the liberality of this grant; and in the conſtruction of ancient grants and deeds, there is no better way of conſtruing them than by uſage, and *contemporanea expoſitio* is the beſt way to go by."

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The corporation of *Portſmouth* conſiſts of a ſelect body, and an indefinite number of burgeſſes. In *Rex* v. *Varly*, *Cowp.* 248, the queſtion was, whether an act, committed by charter to the mayor, aldermen and burgeſſes, or the greater part of them, was well executed by the majority preſent at a regular meeting, although that meeting did not include a majority of the ſubſiſting number; the uſage was in favour of the act, which alſo appeared to the Court to be the true conſtruction of the charter. Lord *Mansfield* ſaid, ſuppoſing the words of the charter doubtful, the uſage is of great force, not that uſage can overturn the clear words of a charter, but if they are doubtful, the uſage under the charter will tend to explain the meaning of them, eſpecially in a caſe like this, where the corporation before conſiſted of an indefinite number of burgeſſes by preſcription; and the charter added no new members but only incorporated the old ones.

In *Gape* v. *Handley*, 3 *T. R.* 288. *n.* it appeared that the preſentation to the rectory of St. *Alban's*, was given by charter to the mayor and burgeſſes; and the queſtion being, whether the right was to be exerciſed by all the burgeſſes, or only by the mayor and aldermen, Lord *Mansfield* ſaid, "The uſage is uniform: if the charter was doubtful, ſuppoſing the queſtion to have ariſen recently, the uſage is a ſtrong information of the true conſtruction." In *Blankley* v. *Winſtanley*, 3 *T. R.* 279. the queſtion was, whether the juſtices of the county of *Leiceſter*, had a concurrent juriſdiction with thoſe of the borough? The Court, upon the conſtruction of the charter, were of opinion that they had.—*Buller J.* ſaid, "Uſage, conſiſtent with the charter, has prevailed for 190 years paſt; and if the words of the charter were more diſputable than they are, I think that ought to govern the caſe. There are caſes in which the Court has held, that ſettled uſage would go a great way to controul the words of a charter. And it is for the ſake of quieting corporations, that this Court has always upheld long uſage where it was poſſible, though recent uſage would perhaps not have much weight."

In *Withnell* v. *Gartham*, 6 *T. R.* the power of appointing a ſchool-maſter at *Skipton*, was given to the miniſter and church-wardens; the point in diſpute was, whether all the church-wardens muſt concur, or whether the act of the majority was ſufficient. The jury found the uſage to be in favour of an appointment by a majority; this accorded with the opinion of the court upon the conſtruction. In ſpeaking of the uſage, Lord *Kenyon* ſaid, it was inſiſted it muſt be rejected, becauſe no uſage could be let in to explain a private deed; but that there was no difference between a private deed and the king's charter. In both caſes, evidence of

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uſage muſt be given to expound them. Mr. Juſtice *Lawrence* ſaid, "It is clear that if there be any ambiguity in this deed, uſage is admiſſible to explain it. And the argument of convenience from this or that conſtruction of a deed, creates that ſort of ambiguity that ſhould be explained by uſage." He added, "that although it was contended that this uſage ought not to be concluſive on *Lincoln College*, to whom the right devolved in default of the church-wardens, there was no reaſon why they ſhould not be bound by it; for if it had at all times prevailed, inſtances muſt have occurred in which they had had an opportunity of diſputing it, if they had thought proper; and having always acquieſced, they are now concluded."

In *Rex* v. *Oſbourne*, 4 *Eaſt*, 327. it appeared that the power of electing aldermen of *Kingſton upon Hull*, was committed to the mayor and commonalty. According to the opinion of the court, and the uſage under the charter, the term *commonalty* includes the aldermen. Lord *Ellenborough* ſaid, that even without reſorting to any aſſiſtance from cotemporaneous, and ſubſequently continuing uſage, (to which however in ſuch caſes, upon the beſt authorities in the law, reſort may allowably be had,) on the face of the charter itſelf, by a fair conſtruction of it, commonalty does include the aldermen.

It is obſervable that in all the preceding caſes, except that of the *Attorney General* v. *Parker*, (where the excluſive latitude of the terms was ſuch, that both parties found it neceſſary to reſtrain them, by reſorting to an alleged uſage in their own favour,) the recourſe to uſage was only applied to as an auxiliary argument; and that the opinion founded upon the mere conſtruction of the inſtruments themſelves, was conformable to the uſage under them. In the caſe of *The King* v. *Bellringer*, 4 *T. R.* 810. the charter of *Bodmin* gave a power to a definite body, which was exerciſed by a majority of the ſubſiſting body, but not by a majority of the definite number; the replication impeaching this act, alleged that by uſage no election had been made, or could be made by leſs than a majority of the definite number. The Court declined deciding upon the validity of the uſage alleged, or upon the manner of pleading it, becauſe they held that, by the conſtruction of the charter, excluſive of the uſage, a majority of the definite number was requiſite. Mr. Juſtice *Lawrence*, upon that caſe being cited in *The King* v. *Oſbourne* ſaid, that the uſage there was not to explain a doubtful word in an old charter, but to give a conſtruction to the general terms of it. It is perfectly evident that nothing was decided upon this ſubject in *The King* v. *Bellringer*, the uſage and the conſtruction being, as in the other caſes above cited, in uniſon.

uniſon. But in *The King* v. *Miller*, 6 *T. R.* 268, where an act of parliament conſtituted a body of 48 perſons who, in conjunction with others, were empowered to do corporate acts in the town of *Northampton*; and a uſage was pleaded, according to which the attendance of a majority of the number of 48, directed by the act would not be requiſite, and which uſage had ſubſiſted for 300 years, it was held that ſuch a majority was requiſite under the act, and that the caſe would not be affected by the uſage; former caſes having decided in favour of the neceſſity of the majority of a definite body attending in the performance of acts delegated to ſuch body, as a general queſtion. Mr. J. *Groſe* ſaid, he admitted that where there is any doubt in a ſtatute or charter, it may be explained by uſage; but there was no doubt on the words of this ſtatute, and if the uſage were to be received, it would be for the purpoſe of creating, not of explaining a doubt.

Here the uſage was not allowed to prevail, being in oppoſition to what was held the true conſtruction of the charter, as deduced from the general law eſtabliſhed with reference to the ſubject in preceding caſes. So that, upon a general view of the ſubject, the actual effect of uſage under a particular inſtrument, in explaining the inſtrument itſelf, appears to be very confined indeed; although very frequent opinions have been, by great authorities, expreſſed in favour of it. The general principle which is to regulate the admiſſion of it, is in itſelf ſufficiently vague; whether the words of an inſtrument are clear or doubtful, is a queſtion, the expoſition of which will often depend upon the particular character and mode of thinking of the individuals to whom it is addreſſed; embracing every variety, from the deciſive impetuoſity which doubts of nothing, to the fluctuating imbecillity which doubts of every thing. It has often been ſaid, that the law has no doubts, and that every doubt which occurs in a judicial inquiry, is only that of the individual. The laſt caſe which has been cited ſhews, that the clearneſs which excludes the evidence of uſage, is not merely that which reſults from the particular point in queſtion being ſo preciſely defined in the inſtrument as to leave no latitude for the application of the general rules of interpretation; but alſo, that which is deduced from preceding determinations, upon the effect of general expreſſions, though ſuch determinations may have been made long after the date of the inſtrument in diſpute, and refer to points which profeſſional perſons have regarded as ſubjects of great uncertainty. Is the admiſſibility of explaining a charter by uſage, to be regulated then by the time when the queſtion occurs? If, previouſly to the time of deciding *The King* v. *Bellringer*, the Court had regarded

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it as a doubtful point, whether the act of the majority attending was ſufficient, without the majority of the definite number being requiſite, a ſimilar caſe had occurred to that from *Northampton*, upon which the Court had conſidered themſelves relieved from deciding the general queſtion; becauſe, being a matter of doubt, the ſubject ought, in the particular caſe, to be decided by uſage; and afterwards, the general queſtion had neceſſarily, or caſually become the ſubject of a judicial determination, by which the doubt before exiſting had been removed, and then a third caſe had occurred, ſimilar to the firſt; would it be ſaid that, in conſequence of the clearneſs now thrown upon the ſubject, the evidence of uſage would be inadmiſſible? Or, blinking ſtill further the application of a general principle, would it be decided, that as there was already a precedent, that under thoſe particular circumſtances uſage ſhould be allowed to prevail, that precedent ſhould not be diſturbed, although, if the firſt caſe had happened then, the law having received a new light, it ſhould have been determined differently?

This latter ſolution would only be a different ſtatement of the ſame propoſition, that the deciſion of the caſe would be made dependant upon the time of its deciſion, upon a term ſooner or later, nay, poſſibly upon the caſual arrangement of the caſes upon the ſame day; for the improbability of a particular occurrence cannot affect the expoſition of the principle. And the deciſion upon the ground of uſage, which was right in the firſt inſtance, becauſe the conſtruction was then doubtful, might become wrong upon an appeal, becauſe the doubt had been removed by an intermediate deciſion upon the general queſtion.

Some deciſions of Lord *Mansfield* had proceeded upon the principle, that a court of law might take notice of equitable titles in ejectment, if the equity were clear, but not if it were doubtful. One of the firſt things that the preſent writer heard in *Weſtminſter-Hall*, was a proteſt by Lord *Kenyon* againſt the admiſſion of ſuch a diſtinction; which occaſioned Mr. *Bearcroft* to make the obſervation, that what was clear, and what was doubtful in equity, was itſelf frequently very far from a clear queſtion. How far the rights of parties may be bound by ſuch acquieſcence, as is ſtated by Mr. Juſtice *Lawrence*, in *Withnell* v. *Gartham*, may deſerve very ſerious conſideration, when a caſe ſhall ariſe depending upon that point. To raiſe the point, the acquieſcence muſt be aſſumed to be in acts contrary to the true conſtruction of the inſtrument; the number of inſtances, and the duration of time, in which they muſt have occurred is left perfectly undefined. Certainty and repoſe are deſirable objects, but where no ſtatute of limitations intervenes, the

the foundation and baſis of the title itſelf is intitled to a greater ſhare of judicial regard than the mere ſubmiſſion, through miſtake, indolence, or apprehenſion of expence, to a ſucceſſion of acts in oppoſition to it. The principal caſe in which uſage can be legitimately reſorted to is, where the inſtrument contains expreſſions in themſelves vague and undeterminate, ſuch as inhabitants, burgeſſes, commonalty; but ſuſceptible of preciſion by an expoſition of the ſtate of the ſubject to which they were intended to refer. In the caſe of the borough of *Preſton*, it was reſolved by the Houſe of Commons, that the right of election was in the inhabitants at large. At a ſubſequent period, the Houſe refuſed evidence to ſhew, from the circumſtances of the conteſt upon which that reſolution took place and all anterior and ſubſequent uſage, that the perſons who claimed under the denomination of inhabitants, were the freemen in oppoſition to a ſelect body. A committee afterwards decided, that the right was in the inhabitants at large, but as that deſcription was too vague and uncertain, they recommended paſſing an act of parliament to define it. No ſuch act has paſſed, and under the authority of theſe determinations, every reſident, in whatever quality, not diſabled by the general law, at preſent votes in the elections, which is a right more extenſive than exiſts in any other place. Here the explanations by uſage would have been properly introduced, it would have been merely explanatory of the ſubject matter, to which the firſt reſolution was intended to refer; and it is not probable that a court of law, acting upon true judicial principles, would have excluded it.

The above claſs of caſes, is referable to ſubjects which are in ſome degree of a public nature. In the caſe of *Cooke* v. *Booth*, *Cowp.* 819. the expoſition of an inſtrument by the uſage which had prevailed under it, was extended to a ſubject entirely of a private nature; a leaſe contained a covenant of renewal, the queſtion was, whether the ſubſequent leaſe was to contain the ſame covenant? There having been ſeveral ſucceſſive renewals, the Court of King's Bench decided, that the parties had thereby put the conſtruction upon it, and ſhould therefore be bound. This was ſubſtituting the apprehenſion of a party, as to the legal conſtruction of an inſtrument, for ſuch conſtruction itſelf; but the late and preſent Maſter of the Rolls have entered their proteſts againſt ſuch a principle, and there is little probability of the precedent being adhered to. *Vid.* 3 *Veſ.* 298. 6 *Veſ.* 237.

The rule concerning explaining written inſtruments by extrinſic evidence, upon which I have thought it expedient to dilate with ſo much particularity, is confined to queſtions upon the effect and

expoſition

expoſition of inſtruments admitted to be valid, and not to queſtions reſpecting their validity, which may be dependant on external circumſtances, and conſequently upon verbal teſtimony.

That an inſtrument was extorted by force, or obtained by fraud, is an objection which no apparent regularity can obviate.

There are ſeveral inſtances, by which this poſition may be illuſtrated with reſpect to fraud, but it may be ſufficient to refer to the well known doctrine reſpecting policies of inſurance being vitiated by the miſrepreſentation of a material circumſtance, and to a recent caſe in which parol evidence of a teſtator, aſking whether the will which he ſigned was the ſame as a former one, and of his being falſely anſwered that it was, was held admiſſible; the object of the evidence being to ſhew that the will was obtained by fraud, and not to explain its contents. *Doe* v. *Allen*, 8 *T. R.* 147 (*a*).

A contract which upon the face of it is regular, may be impeached as uſurious. And generally any thing which ſhews the illegality of a tranſaction, may be allowed to impeach the obligations reſulting from it, even as between the contracting parties, however formal and regular in its appearance. This ſubject was examined with great ability, by Lord Ch. J. *Wilmot*, in a caſe which ſhewed the ultimate object of a bond, to be the ſuppreſſion of a proſecution for perjury, and which was before alluded to in diſcuſſing the doctrine of illegal contracts, *Collins* v. *Blantern*, 2 *Wilſ.* 347. Where an inſtrument is ſo drawn as upon the face of it to elude the ſtamp duty, as by dating a bill of exchange drawn in *England* at *Hamburgh*, the party to it is not precluded from impeaching the inſtrument, by ſhewing the

(*a*) In *Young* v. *Clark*, *Prec. Chan.* 530. the Court of Chancery refuſed to execute a written agreement for a leaſe, it appearing that the tenant had artfully kept the owner in the dark, with reſpect to the value. So Lord *Hardwicke* refuſed to execute a contract for the ſale of timber, entered into upon a falſe repreſentation, that *A.* and *B.* had valued it at 3500*l.*, whereas in fact they had valued it at only 2500*l.*, *Buxton* v. *Liſter*, 3 *Atk.* 383. So Lord *Thurlow*, to execute a purchaſe of an eſtate, repreſented to be of the neat value of 90*l.* a-year, there being an induſtrious concealment of the neceſſary repair of a wall, to protect the eſtate from the ſea at great expence, *Shirley* v. *Stratton*, 1 *Bro. Ch.* 440. But Sir *William Grant*, Maſter of the Rolls, in *Woollam* v. *Hearn*, 7 *Veſ.* 211. refuſed to vary, at the inſtance of the plaintiff, a written agreement for a leaſe of 70*l.* a-year, and to ſubſtitute a leaſe for 60*l.* upon the ground of the defendant having repreſented that 70*l.* was the rent he paid himſelf, when it was only 60*l.*; and diſtinguiſhed between the caſes, where a defendant alleges the fraud as a defence againſt performing an agreement, and thoſe where a plaintiff comes to enforce an agreement, according to the repreſentation. This diſtinction is evidently founded upon the moſt correct reaſoning, for fraud and miſrepreſentation are only objections which vitiate a contract, and do not conſtitute and induce one. To intitle the plaintiff to a leaſe at the rent paid by the defendant, it is neceſſary to ſhew a poſitive agreement for that purpoſe, attended by the legal requiſites; ſhewing that a different agreement was improperly obtained, is a very different thing from that. With reſpect to this ſubject, I think there can be no legitimate difference between the diciſion of a Court of Law, and a Court of Equity.

truth even againſt a fair indorſee. *Jordaine* v. *Luſhbrook*, 7 *T. R.* 601.

As to the laſt poſition of *Pothier*, the principle upon which it is founded, viz. that two perſons ſhall not, by any colourable proceeding, affect the conſequential rights of a third, is ſo materially connected with the eſſential demands of juſtice, that it may be confidently ſtated as an invariable rule of law.

SECTION IX.

Of the Examination of Witneſſes.

According to the law of *France*, witneſſes could not in general be examined in a civil cauſe, without a previous judgment for the purpoſe, founded upon the allegations of the party requiring ſuch proof, and an examination of the written documents which might either conſtitute a commencement of proof by writing, the nature of which is ſhewn in the preceding treatiſe, Part IV. c. 2. Art. 4. or which being deciſive of the cauſe might exclude all verbal evidence to the contrary. From this judgment admitting proof by witneſſes, an appeal might be, and frequently was, inſtituted. In the *Cauſes Celebres*, there are a great many caſes reſpecting the admiſſibility of proof by witneſſes, in what are called the queſtions of ſtate, that is of birth, marriage, and all other perſonal qualities, reſpecting which very great credit was given to the public regiſters, ſo as frequently to exclude parties from offering proof in itſelf of a very convincing nature, either in oppoſition to ſuch regiſters, or without laying a foundation for it from them. Previous to the admiſſion of verbal teſtimony, the judge decided upon its relevancy to the matter in diſpute, and the admitting ſuch evidence to be given, neceſſarily indicated an opinion that it might be important in the deciſion of the cauſe, and that the other admitted facts were not ſufficient for a full determination, without the aſſiſtance of the propoſed examination, or, notwithſtanding, any teſtimony which it might produce. Thus in the famous caſe of the Prince *de Conti*; the prince claimed the property of the late Duke *de Longueville*, or as he is more generally called in the cauſe, the *Abbé d'Orleans*, under a teſtimentary diſpoſition, the validity of which was open to ſeveral difficult queſtions of law, and alleged that the teſtator, when he made a ſubſequent will, was in a ſtate of inſanity, which fact he required, and was admitted to prove by witneſſes. Upon an appeal from the judgment, *M. d'Agueſſeau* obſerved,

obſerved, that although the original court had not expreſsly decided, that the Prince *de Conti* had a valid title under the firſt will, they had decided it tacitly; for unleſs the will was good he had no title, and would not have been admitted to prove a fact, which would have been abſolutely indifferent to him, ſince however certain the inſanity might be, he could derive no benefit from it. The parliament having decided generally in favour of the judgment, it was agitated upon a ſecond appeal, how far their deciſion had ſettled the point, upon the validity of the firſt will; upon which the ſame learned perſon, after mentioning his former opinion ſaid, he conſidered that they had before determined that queſtion, becauſe it would have been contrary to juſtice, to admit the Prince *de Conti* to go into proof, in which he had not any intereſt, if the firſt teſtament were void; without firſt examining, not only the appearance but the ſolidity of his right, and being perſuaded that that right was certain in itſelf, and only required the aſſiſtance of witneſſes to deſtroy the obſtacle which might be oppoſed to it. He then ſhewed that the firſt queſtion was abſolutely preliminary to the ſecond, and that the parliament would never have directed an examination of the fact, which was the object of the latter, without having come to a determination of the former. "Without that (ſaid he) you would have involved the parties in uſeleſs delays, in immenſe expence, and when they had ſatisfied your ſentence, when one of the parties had examined 84 witneſſes, and the other 76, it would remain to be ſaid, the queſtion is not to be decided by the fact, but by the law. Thus the permiſſion which you had granted would be uſeleſs and dangerous, contrary to equity and juſtice."

So far as I have been able to obtain an acquaintance with the proceedings of our eccleſiaſtical courts, the examination of witneſſes is there conducted upon the ſame principles. Whatever difference exiſts between our courts and thoſe of *France*, and whatever neceſſary general preference may be juſtly due to the former, I conceive that an attention to the principles that have been juſt cited, might in many caſes be attended with infinite utility; and that it is greatly the intereſt of ſuitors, to endeavour to bring their caſe before the court, in ſuch a manner as to obtain, if poſſible, its judgment upon an undiſputed fact, which may be deciſive of the fate of the cauſe, and prevent an unneceſſary accumulation of expence in the earlieſt poſſible ſtage of the proceeding; and that the public intereſt calls imperiouſly upon the courts themſelves, to give their countenance to ſuch an arrangement. With the higheſt admiration of the penetrating wiſdom, and the impartial juſtice

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of Lord *Kenyon*, I have been frequently ſtruck with the impropriety, as it appeared to me, of his adopting a line of conduct founded upon the oppoſite ſyſtem, and in my former publication on the deciſions of Lord *Mansfield*, took occaſion to advert to my impreſſions upon that ſubject, having repeatedly obſerved that, when he had abundant materials to warrant a concluſion, which might be deciſive of the matter in diſpute, whatever might be the reſult of an inquiry into a fact remaining in controverſy, he declined exerciſing his judgment upon thoſe materials, generally reſorting to the obſervation of its being inconvenient to decide by piece-meal. This refuſal to exerciſe a judgment, until the exiſtence or non-exiſtence of a particular fact was aſcertained, naturally occaſioned an expence and delay, which being unneceſſary, it was highly important to avoid, in caſes where, notwithſtanding the reſult of the inquiry, ſo far as regarded the fact in queſtion, might be unfavourable to one of the parties, it muſt frequently have occurred, that that party was intitled to the judgment, upon the other undiſputed circumſtances which were previouſly aſcertained. The two following caſes which I quote from memory will illuſtrate the tendency of the preceding obſervations. In the caſe of *The Corporation of Liverpool* v. *Golightly*, *Mich.* 1791, the queſtion was, whether the right of making bye laws, in that corporation, was veſted in the ſelect body, or in the burgeſſes at large? The counſel for the plaintiff contended, that the words of the charter were ſo clear in favour of the latter propoſition, that no evidence of uſage could be admitted to ſupport a different conſtruction; and Mr. Baron *Thomſon*, at the aſſizes, decided in favour of that opinion. Upon an application to the Court of King's Bench, a new trial was granted for the purpoſe of receiving the evidence of uſage, but without giving an opinion, whether, when received, it could be admitted, however convincing, to have any effect; whereas, if the Court had concurred in the argument which was ſubmitted to them, that no poſſible evidence of uſage could influence the caſe, the examination would have been wholly nugatory; ſo that the poſtponing the concluſion upon that point might have been attended with all the inconveniences above adverted to. The ſubſequent abandonment of the caſe, from a deficiency of the funds appropriated to the conteſt, prevented the point itſelf being ever brought to a deciſion.

In the caſe of *Kilſhaw* v. *Dean*, *Mich.* 1797, a factor of the plaintiff had diſpoſed of goods to the defendant under circumſtances which, it was contended did not affect the property, upon the principle that a factor can only bind the goods of his princi-

pal, ſo far as he acts within the ſcope of his authority; and this, without any regard to the queſtion of the party dealing with him, having no notice of the character in which he holds the goods, of which principle the inability of a factor to pawn is a common inſtance; the argument being conducted upon this point, and upon the right of the plaintiff to recover, even admitting a want of notice in the defendant. Lord *Kenyon* conceiving a probability that the defendant had notice, directed an inquiry to be made in the *Weſt Indies* reſpecting that circumſtance; refuſing to give an opinion upon the general propoſition involved in the caſe, until that fact was aſcertained; the delay occaſioned by which threatened very ſerious inconveniences to the party concerned: whereas, if the opinion of the court had concurred with the plaintiff's argument, aſſuming the ſuppoſition of a want of notice, ſuch inquiry was abſolutely indifferent.

The caſe of *Webb* v. *Fox*, 7 *T. R.* 391. affords another inſtance, of expreſſing an opinion having the ſame tendency. To an action of trover, the defendant pleaded the general iſſue, and alſo that the plaintiff was a bankrupt. Upon a demurrer to the latter plea, Lord *Kenyon* ſaid, he could not commend the mode in which the queſtion was brought before the court, ſince the whole of the caſe might be gone into upon the general iſſue; whereas the defendants, in addition to the plea of not guilty, pleaded a ſpecial plea [which he ſaid, would have been bad upon ſpecial demurrer, as amounting to the general iſſue,] and which would be attended with additional expence to the parties.—Now it is clear, that in caſe the Court had decided in favour of the plea, much expence would have been ſaved, becauſe the allegations of the parties in the firſt inſtance, would have brought the point before the court in as perfect a ſtate as it could have been brought, by the great additional expence of a trial, and a ſpecial caſe. I remember his Lordſhip expreſſing his diſapprobation of the two pleas, with more ſeverity of manner than appears by the report. The queſtion which I recollect his having aſked,—Why, if the ſpecial plea was preferred, was the general iſſue added? might have received the very eaſy anſwer that, although the defendant might expect, by the ſpecial plea, to obtain a cheap and early deciſion of the cauſe, it would not have been judicious to have therefore abandoned every other ground of defence. It muſt not be entirely taken for granted, from the doctrine in the above caſe, that the ſpecial plea would have been bad upon ſpecial demurrer; for there are many inſtances in the books, of matters being ſpecially pleaded in trover, which were, if any defence, a defence available upon the general iſſue.

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The caſe of *Hatton* v. *Morſe*, 1 *Salk.* 394. indicates the true principle upon theſe ſubjects, an attention to which might frequently be productive of the effect, which I have been deſirous to promote in making the preceding obſervations. *Per Holt* Ch. Juſtice:—"In debt, the defendant may plead a releaſe, becauſe it admits the contract which is a colour of action, and yet he might give it in evidence on *nil debet*. So in *aſſumpſit*, the defendant may plead payment, becauſe it admits the *aſſumpſit*, and yet he may give it in evidence on *non aſſumpſit*." Caſes muſt very frequently occur, in which the application of theſe principles would be very important and deſireable, by bringing upon the record, at the ſmalleſt poſſible expence, the real queſtion in diſpute between the conteſting parties.

The preceding obſervations may alſo be applied to the practice of Courts of Equity; in which the defendant may, if the plaintiff's bill does not ſtate a ſufficient caſe to intitle him to relief, demur to the ſufficiency of it; but this right is reſtricted in a manner that ſeems very inconſiſtent with a due attention to the important principle, that the adminiſtration of juſtice ſhould be conducted with the leaſt expence and delay, compatible with the preſervation of its eſſential purpoſes; for it is laid down by Lord *Loughborough*, that a demurrer muſt be founded upon this, that it is a ſhort, certain, clear propoſition, that the bill would be diſmiſſed with coſts at the hearing. *Brooke* v. *Hewitt*, 3 *Veſ.* 255. The reaſon which he aſſigned, for not deciding upon the demurrer in the particular caſe was, that it was not a dry point of law but was a caſe of circumſtances, in which a minute variation of circumſtances might either induce the Court to modify the relief, or to give no relief at all.—But it certainly cannot, in any mode of adminiſtering juſtice, be unreaſonable to expect that a party claiming relief, ſhall be required to allege a caſe, which admitting it to be true, ſhall intitle him to the aſſiſtance which he claims; and that thoſe who are inveſted with judicial authority ſhould, at the inſtance of the oppoſite party, pronounce a deciſion upon the ſufficiency of the charge, without involving the parties in a ſerious expence, and ſubjecting them to an anxious delay, the final reſult of which may be a judgment upon grounds that would equally have been open to deciſion upon the original ſtatement. To inſtance a caſe in which this inconvenience occurred, not upon any judicial determination, but upon the previous opinion of very reſpectable counſel, founded upon the eſtabliſhed practice.—A perſon born before the marriage of her father and mother, claimed the benefit of a proviſion in his will in favour of his chil-

dren; there were a great number of circumſtances in the caſe, which muſt ſatisfy every mind of the real intention, that ſhe ſhould be included; and it was wiſhed originally, in an amicable ſuit, to ſtate all theſe circumſtances in the bill, ſo that a judgment might have been obtained upon demurrer, whether the natural import of the expreſſions of the will could receive a modification from the peculiar circumſtances of the ſubject to which it was applied. But upon conſideration, that a Court of Equity would not decide a queſtion of this nature upon demurrer, it was thought requiſite to go into a tedious and expenſive examination of all the circumſtances raiſing the queſtion in diſpute; and the reſult of that examination was a judgment, that the Lord Chancellor had no doubt of the intention, but that it was impoſſible in a court of juſtice, to hold that an illegitimate child could take equally with lawful children, upon a deviſe to children; *Cartwright* v. *Vawdrey*, 5 *Veſ.* 530. a deciſion which, conſiſtently with the real purpoſes of juſtice, though not with the uſage of the court, might have been equally made upon the original allegations.

I have thought it adviſable to dwell with ſome particularity upon this ſubject: for, although I have not the preſumption to imagine that any ſuggeſtions of mine will alter the courſe of judicial proceeding, the object, with which theſe ſuggeſtions are connected, muſt be allowed to be of very material importance, by all who have had an opportunity of obſerving the frequency with which the expence of litigation becomes a more ſerious conſideration than the original matter of diſpute; and with the failure which claims ſupported by the ſubſtantial principles of juſtice muſt often experience, from the inability or terror of ſuſtaining the requiſite expences of aſſerting them; and if there is a poſſibility that the attention of the profeſſion may be beneficially directed to the ſubject, the ſtatement of theſe conſiderations will have received a ſufficient apology.

The examination of witneſſes may be either taken privately before a judge or officer, as is the caſe in chancery proceedings, or publicly, and in open court, as in trials at common law. In particular caſes, a witneſs is, by ſpecial authority, examined before an officer, or commiſſioners for the purpoſes of a trial at common law; as where the witneſs reſides, or is going abroad, or where his evidence is taken, by virtue of a bill in equity, for the perpetuating teſtimony; in theſe caſes, the written depoſitions cannot be read, if there is an opportunity of examining the witneſs, in the accuſtomed manner at the trial; and the death, or abſence of the witneſs muſt be ſhewn, or circumſtances muſt be laid before the court, from which they may be inferred.

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The depoſitions which have been regularly taken, in a former proceeding, between the ſame parties, are properly admiſſible in evidence, where the examination of the witneſſes cannot be had, in the immediate proceeding; and parol evidence may, under ſimilar circumſtances, be given with reſpect to what a deceaſed witneſs, or I conceive a witneſs reſiding out of the kingdom, ſwore upon a former trial between the ſame parties: ſuch evidence is not admiſſible in a criminal proſecution.

In thoſe caſes the party againſt whom the evidence is adduced, cannot, in general, be deemed to ſuffer any material prejudice; for he had a full opportunity of ſifting the teſtimony, by croſs examination, at the time of its being originally given, which would, in many reſpects, and indeed in every reſpect, except the obſervations which may ariſe upon the demeanour of the witneſs, be attended with the ſame advantage, as if ſuch teſtimony had been firſt adduced in the immediate proceeding. But there are caſes where parties are affected by teſtimony, which they had not any opportunity of ſcrutinizing, and by the admiſſion of which they may receive a material prejudice.

The ſtatute 5 *Geo.* 3. *c.* 30. contains a proviſion for entering on record the depoſitions taken upon commiſſions of bankrupt, and directs, that in caſe of the death of the witneſſes proving the bankruptcy, a true copy of ſuch depoſitions ſhall, upon all occaſions, be given in evidence to prove ſuch bankruptcy. It has been held in the expoſition of this ſtatute, that the depoſitions are evidence, not only of the fact of committing the act of bankruptcy, but alſo of the time of its being committed. *Janſon* v. *Wilſon*, *Doug.* 244.

By the annual mutiny act, it is provided that two or more juſtices of peace, where any ſoldier ſhall be quartered, in caſe ſuch ſoldier has a wife, or children, may ſummon him to make oath of his ſettlement; and an atteſted copy of ſuch affidavit ſhall be at any time admitted as evidence of ſuch ſettlement, and ſuch ſoldier ſhall not be again obliged to make any other oath reſpecting his ſettlement.

By the ſtatutes of *Philip* and *Mary*, juſtices of peace are directed, in the caſe of perſons being brought before them for felony, to take the examinations of the witneſſes in writing. Theſe ſtatutes do not contain any proviſion for the examinations being admitted as evidence, in caſe of the inability of the witneſs to attend at the ſubſequent trial; and there certainly is a very great uſe in taking ſuch examinations, for the purpoſe of aſſiſting the judge at the trial, and in preventing the corruption and prevarication of witneſſes,

without its being neceſſarily regarded as the object of the ſtatutes, that the examinations themſelves ſhould be admitted as evidence upon the trial; but in point of practice, it is now eſtabliſhed that ſuch examinations, if taken in the preſence of the party charged, ſhall be admitted as evidence, in caſe of the witneſs's death in the mean time. I rather think that this practice originated from its being taken for granted, without due examination, that the ſtatutes were intended to have this operation; and that afterwards, the practice being eſtabliſhed, it was not thought proper to diſturb it; for in the caſe of *The King* v. *Paine*, *Salk.* 281. upon offering ſuch an examination in the caſe of a miſdemeanor, it was ſaid by the Court of King's Bench, upon advice with the judges of the Common Pleas, that in caſe of felony, ſuch depoſitions before a juſtice, if the deponent die, may be uſed in evidence by the ſtatutes of *Philip* and *Mary*; but that cannot be extended farther than the particular caſe of felony. But it is evident that in this caſe, it was unneceſſary to conſider whether the depoſitions could be admitted as evidence in caſes of felony; the judges correctly adverted to the circumſtance, that the proviſion of the ſtatutes was inapplicable to the caſe of miſdemeanours; and the queſtion whether, becauſe an examination is directed to be taken, it ſhall, under given circumſtances, be received in evidence, was perfectly irrelevant; ſo that what was ſaid upon this ſubject was merely incidental. It appears by a note of Mr. *Peake*, 2 ed. pa. 93. that it is the practice to receive in evidence the depoſitions which were taken before the coroner by a witneſs who is dead, whether the party charged was preſent or not.

The queſtion, whether the examination of a pauper reſpecting his ſettlement, taken before two juſtices who did not remove him, was admiſſible upon an appeal from an order, afterwards made, the pauper having become inſane, (which was regarded as equivalent to his being dead) received a very elaborate deciſion in the famous caſe of *The King* v. *Eriſwell*, 3 *T. R.* 373. upon which the judges were equally divided. The judges whoſe opinions were in favour of admitting the evidence, went upon the extenſive principle of admitting even hearſay evidence, upon queſtions of this deſcription. Mr. Juſtice *Groſe*, who took the oppoſite ſide, partly founded his opinion upon the examination being extrajudicial, and it might be collected, that if it had been taken for the purpoſe of an order of removal, he would have thought it admiſſible; but Lord *Kenyon* diſtinctly expreſſed his opinion, that even if the examination had been taken to found an order of removal upon it, it would have been no better than a mere declaration of the party. I conceive that this

point

point may now be conſidered as at reſt; for although it has not been expreſsly decided, that an examination taken before magiſtrates, as the foundation of an order of removal, cannot be read in evidence after the pauper's death, the point appear's to be the clear reſult of the deciſions which have actually taken place. In *The King* v. *Nuneham Courtney*, 1 *Eaſt*, 373. the pauper, whoſe examination was taken, abſconded between the removal and the appeal; the Court, without giving any formal judgment, expreſſed a decided opinion againſt the admiſſibility of the evidence; which was acquieſced in by the counſel. In *The King* v. *Ferry Fryſtone*, 2 *Eaſt*, 54. the examination was not taken for the purpoſe of removal, and the pauper was dead, the Court rejected the evidence; and Lord *Kenyon* ſaid, that it was true that in the caſe of *Nuneham Courtney*, there was no evidence that the perſon, whoſe examination was taken, was dead; but the opinion of the Court againſt the general doctrine of the two judges who ſupported the reception of the evidence in the former caſe, was pretty broadly hinted. The caſe of *The King* v. *Abergwilly*, 2 *Eaſt*, 63. was alſo that of a written examination never acted upon. Theſe caſes certainly ſtrongly manifeſt the diſpoſition of the court, and it ſeems to be pretty clear that the deciſions were not founded upon the minor circumſtance, in the two laſt, of the examinations having been extrajudicial, or in the firſt, upon the diſtinction between the pauper's death or his having abſconded, but upon the more general principle which includes the death of the pauper, after a regular examination. I have known a court of quarter-ſeſſions admit the evidence of ſuch an examination, and refuſe a caſe, upon the rectitude of doing ſo, out of tender regard to the litigant townſhips; as the diſpute regarded only the ſettlement of a ſingle individual, and the expence of agitating the queſtion, would probably amount to more than that of maintaining the pauper.

In *The King* v. *Ravenſtone*, 5 *T. R.* 373. it was ruled that the examination, before birth, of a woman with child, is, in caſe of her death, evidence againſt the putative father.

In *Breedon* v. *Gill*, 1 Lord *Raym.* 219. 2 *Salk.* 555. the commiſſioners of appeal proceeded upon the minutes of evidence taken before the commiſſioners of exciſe, which the Court of King's Bench thought wrong, and granted a prohibition as to the admiſſion thereof. But *Holt*, Ch. J. ſaid, that his private opinion was, that if the witneſſes were dead, or could not be found, then the commiſſioners of appeal might make uſe of the depoſitions; but that not being before him judicially, he would not give a judicial opinion.—Whoever has had an opportunity of attending courts of

judicature, and alſo of ſeeing the private examinations which are taken upon many of the occaſions above alluded to, muſt be convinced of the great danger of ſuffering any public or private intereſts to be affected by ſuch examinations. Wherever the narration of a witneſs may be the ſubject of objection, on account of his want of veracity, the failure which juſtice muſt experience from the want of an opportunity of trying the fact by a minute examination of circumſtances, open to contradiction, by fixing the witneſs to particulars of time and place, and all other topics not comprized in a general ſweeping account, will be manifeſt to the moſt curſory obſervers. When an objection to the veracity of the witneſſes, who have been believed upon the firſt examination, is the very cauſe and motive of the appeal, the dead letter narrative, taken by a clerk in the exciſe, or by a country juſtice, exhibits none of thoſe prevarications of manner, none of thoſe indications of inſincerity, upon which an adequate judgment, in many caſes, ſo eſſentially depends.

But even when all ſuſpicion of veracity is ſuppoſed to be out of the queſtion, how very unſatisfactory is the *ex parte* account of a witneſs taken under circumſtances, in which the adverſe party had not a fair opportunity of croſs examination, or in which ſuch an examination, being unuſual, could not reaſonably be expected to have taken place.

In the examinations taken before magiſtrates in caſes of felony, the object of inquiry is not the acquittal or conviction of the priſoner, but the propriety of confining him for the purpoſe of trial; he has not thoſe aſſiſtances for analyſing the proofs which are adduced againſt him, which exiſt upon a ſolemn trial, where he can call in aid the exertions of judicious advocates, and is ſure of the protection of a learned and impartial judge. The minute inveſtigation of the material facts may have even been deemed irrelevant to the immediate purpoſe of the inquiry; the combating of the evidence by profeſſional aſſiſtance, or by adverſe teſtimony, is frequently diſallowed; and it is a very hard meaſure, that an authentic record may be taken of the evidence which tends to criminate, while there is not an equal opportunity of preſerving the materials of defence. In one point of view, the admiſſion of theſe examinations may not be very objectionable, that is, in reſpect to their producing a manifeſtation of the demeanour of the priſoner, upon the occaſion of hearing them, when his ſilence may be juſtly regarded as a mark of acquieſcence; but then the examinations ought to be treated, not as immediate evidence of the facts related, but as evidence of certain facts being imputed to the priſoner in

his

his preſence, and of his conduct upon receiving the imputation; and even in this point of view, the ſubject cannot be treated with too much caution.

The deciſion of the event by the materiality of facts diſcloſed, on croſs-examination, is a matter of perpetual occurrence; a witneſs before a magiſtrate, depoſes to a priſoner's confeſſion; he would depoſe the ſame upon the trial; but upon the interpoſition of the judge, it appears that the confeſſion was improperly obtained, and the evidence is rejected, but the witneſs is dead, the depoſition is produced, and the priſoner, upon the ſtrength of it, is convicted.

In caſes of ſettlement, nothing can be more unſatisfactory than the examinations, which are uſually produced upon an *ex parte* proceeding, inſtituted by a pariſh for its own convenience, and depoſited privately in its cheſt. *A. B. ſwears, that he gained a ſettlement in C., by being hired for a year, and ſerving a year to D. E. now deceaſed.* A very ſlight peruſal of the ſettlement law will ſhew how intricate a ſyſtem is eſtabliſhed, with reſpect to the definition of a hiring and ſervice for a year; and how inadequate a perſon who has been engaged in any employment muſt commonly be to form a judgment upon the complex propoſition of law and fact reſulting from any given combination of circumſtances. It would certainly not be unreaſonable in future mutiny acts to provide, that an examination, taken under them, ſhould be tranſmitted, within a definite time, to the pariſh which it purports to charge, and that the officers of ſuch pariſh ſhould be allowed to require a ſecond examination, at which they might have an opportunity, with profeſſional aſſiſtance, to make a more particular inquiry.

The poſitive directions of a permanent ſtatute have fixed the law upon this ſubject with reſpect to caſes of bankruptcy, and there can be but one opinion as to the propriety of carrying that law into execution, according to the true conſtruction of its intention; but with reſpect to the expediency of ſuch a law, and its connection with the fair expoſition of truth, the experience of every lawyer muſt furniſh many inſtances of a ſet of cut-and-dried depoſitions being unable to ſtand the teſt of an open croſs-examination.

The only remaining topic ariſing from the preceding caſes is, the examination in caſes of baſtardy; which certainly has not any particular reaſons of exception, from the general obſervations reſpecting the unſatisfactory character of *ex parte* depoſitions.

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It is a general requiſite to the examination of witneſſes, that their teſtimony ſhall be given upon oath; but the manner in which the oath is commonly adminiſtered, is not very much calculated to impreſs the mind with the ſolemnity of its obligation.

Infidels who profeſs no religion that can bind their conſciences to ſpeak truth cannot be witneſſes. But when any perſon profeſſes a religion that will be a tie upon him, he ſhall be admitted as a witneſs, and ſworn according to the ceremonies of his own religion; for it would be ridiculous to ſwear a witneſs upon the holy Evangeliſts, who did not believe thoſe writings to be ſacred. The *Jews* are always ſworn upon the *Old Teſtament*, *Mahometans* on the *Koran*, thoſe of the *Gentoo* religion, according to the ceremonies of that religion, &c. *Bull. N. P.* 282. See a very full and inſtructive diſcuſſion of this ſubject, in *Omichund* v. *Barker*, 1 *Atk.* 21. 2 *Eq. Ab.* 397.

The affirmation of *Quakers* is by *Stat.* 7 & 8. *W.* & *M.* rendered admiſſible, where an oath is required from others, except in criminal caſes; which exception has been held to extend to the caſe of an appeal for murder, *Str.* 854. a motion for an attachment for non-performance of an award, *Str.* 441. a motion for an information, for a miſdemeanour, *Str.* 872. articles of the peace, *Str.* 527. a rule to anſwer the matters of an affidavit, *Str.* 946. and an affidavit in defence of another, but not in defence of themſelves againſt a criminal information, 2 *Bur.* 1117. It is held not to extend to a caſe reſpecting the appointment of an overſeer, *Str.* 1219. or a penal action, *Atcheſon* v. *Everett*, *Cowp.* 382. Lord *Mansfield*, in that caſe, took a very comprehenſive view of the ſubject, and ſeemed to diſſent from ſome of the preceding caſes of excluſion. By the ſame caſe, it appears that kiſſing the book is not eſſential to an oath; but any other ſolemnity, which a witneſs may think more binding, will be admitted.

In ſome Roman Catholic countries a notion prevails, that an oath impoſes no obligation, in point of conſcience, unleſs the perſon ſwearing has a crucifix before him. I have been informed of an inſtance which took place before the perſons relating it to me, of a *Portugueſe* who, upon the cuſtomary examination taken before commiſſioners, upon bringing in a veſſel as prize, gave a full and diſtinct account of the neutrality of the veſſel; but upon a ſuggeſtion of the prevalence of the notion above mentioned, a crucifix was exhibited to him, which induced him inſtantly to retract what he had ſaid, and admit a caſe of enemy's property.

Many learned perſons differ in opinion with reſpect to the comparative advantage of a public examination in open court, and a private

private examination before a judge or commiſſioners, each commonly adopting the ſide which has been familiar to his own habits of practice. Sir *William Blackſtone* ſtrongly maintains the advantage of the former, as more conducive to the clearing up of truth; and obſerves, that a witneſs may frequently depoſe that in private which he will be aſhamed to teſtify in a public tribunal. He alſo takes notice, that the occaſional queſtions of the judge, the jury, and the counſel, propounded to the witneſs on a ſudden, will ſift out the truth much better than a formal ſet of interrogatories previouſly penned and ſettled; and the confronting of adverſe witneſſes is alſo another opportunity of obtaining a clear diſcovery, which can never be had upon any other method of trial; and that by this method of examination, and this only, the perſons who are to decide upon the evidence have an opportunity of obſerving the quality, age, education, underſtanding, behaviour, and inclination of the witneſs; in which points all perſons muſt appear alike, when their depoſitions are reduced to writing, and read to the judge, in the abſence of thoſe who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. *Commentaries*, III. 373.

Dr. *Brown* takes the oppoſite ſide, and after obſerving that the witneſſes in the Eccleſiaſtical Courts, are to be ſecretly and ſeparately examined, not in the preſence of the parties or other witneſſes, and that their depoſitions, after being read over to them article by article, and they aſked whether there be any thing which they wiſh to alter or amend, are to be ſigned by the witneſs, and be afterwards repeated before the judge, *i. e.* aſked again in the open court by the judge, whether there be any thing which he wiſhes to alter or correct; ſubjoins the following note. "How much is this preferable, in ſome reſpects, to an examination at *Niſi Prius*, where every incautious or haſty expreſſion is inſtantly bellowed to the jury, and inſiſted upon, without giving time to the witneſſes to correct a particle, or if he attempts to do it, perjury or prevarication is immediately charged on him?" *Lectures on Civil Law*, Vol. I. p. 479.

Sir *W. Blackſtone*, in the place above cited, ſpeaks of the power of a witneſs to correct and explain his meaning if miſunderſtood, as one of the advantages of open examination, in preference to the evidence appearing in the language of an artful, or careleſs ſcribe. So far as the reſpective examinations may be ſuppoſed to be taken with proper care and attention, and by perſons of adequate ability I conceive that, with reſpect to this power of correction, the advantage is on the ſide of the written examination.

If

If the ſubject of the examination requires a conſiderable portion of time to be allotted to it, an inconvenience is alſo likely to reſult, in the uſual arrangement of buſineſs, from the limited portion of time employed in trials at *Niſi Prius*, the preſſure of other buſineſs, and the want of an opportunity of admitting thoſe relaxations and intermiſſions, which an adequate attention to the ſubject will naturally require, a conſideration which often renders it neceſſary, for the purpoſes of juſtice, to ſubmit caſes of this deſcription to arbitration, when an aſſiduous attention of many days, or even weeks, is often found requiſite for the examination of a caſe, which, upon an open trial, muſt be diſpoſed of in a few hours, or if neceſſarily protracted beyond that time, muſt be continued, without an adequate allowance for the remiſſions of attention, which nature abſolutely demands.

In this, as in many other caſes already alluded to in the preſent number, the rule which is eſtabliſhed on either ſide, upon a principle of general preference, muſt, in a great many inſtances, fail in the particular application. The latent fraud which would eſcape detection in the formality of a private examination will often become conſpicuous from the well-timed impreſſion of a judicious queſtion before a public auditory; but the truth which is overwhelmed by the petulance and inſult, that ſometimes accompany the practice of public examination, may exert its full influence where the circumſtances that excited confuſion and timidity are removed. I think the general balance is ſtrongly in favour of a public examination, but that the abuſes and inconveniences to which ſuch an examination is liable, require a conſtant and zealous attention of the Court, in their correction or ſuppreſſion.

I am apprehenſive that the following obſervations upon the teſtimony of witneſſes which have occurred to me, if not during an extenſive practice, at leaſt during an attentive obſervation of the proceedings of courts of juſtice, will appear very vague and unſatisfactory as applied to the extent and importance of the ſubject of them; and at the ſame time will, from the ſpace which they occupy, be condemned for their diffuſeneſs and prolixity; but although I am conſcious of my inability to afford ſuch a view of this ſubject as would correſpond with my wiſhes, I am deſirous of offering ſuch a contribution towards it as accords with the more humble limits of my power.

All regard to teſtimony ſuppoſes the general propoſition, that witneſſes, not having any motives for aſſerting what is falſe or ſuppreſſing what is true, having had an adequate opportunity of obſerving the ſubject to which they depoſe, having actually obſerved it with

adequate attention, and having a diſtinct and perfect memory with reſpect to it, relate what they have ſeen, or heard with accuracy and fidelity; and the veracity of teſtimony, given by perſons fully anſwering this deſcription, is received and acted upon as a ſufficient teſt of moral and judicial certainty. If a perſon, wholly indifferent to the event of a cauſe, ſhould depoſe that within the preceding hour, he had ſeen one of the parties with whom he was perfectly well acquainted, execute a releaſe, the fact of ſuch execution would be admitted as a certain truth.

But in judicial inquiries, recourſe muſt often neceſſarily be had to teſtimony, not completely anſwering the deſcription which has been given, or with reſpect to which the application of that deſcription may not be fully aſcertained; and the ſcale of teſtimony deſcends from that high aſſurance, which is for all moral purpoſes equivalent to certainty, through every gradation of inferior teſtimony, to that which leaves the judgment completely in ſuſpenſe, and from thence, through all the degrees between the ſlighteſt preponderance on the ſide of incredulity, to the extreme of ſelf-convicted falſehood.

If a perfect and abſolute aſſurance that a witneſs completely anſwered the above deſcription, were in every caſe to be regarded as an eſſential preliminary to the credence of his evidence, the incredulity would, in numerous inſtances, be in oppoſition to the actual truth of the thing related. Such an incredulity would be the effect and ſign of imprudence, in the ordinary intercourſe of life; in the adminiſtration of law, it would frequently occaſion a failure of right, and conſequently merit the appellation of injuſtice.

Teſtimony therefore will, for either purpoſe, be in general regarded as accurate and true, unleſs there is reaſon, from its own inherent qualities, or from extrinſic circumſtances, for forming an oppoſite concluſion, or at leaſt, for ſuſpending the judgment.

If there is an adequate opportunity for arriving at certainty, or obtaining further information reſpecting the truth of evidence, upon which the judgment is divided, the mind will require the ſatisfaction of which the ſubject is ſuſceptible, either in confirmation of the fact aſſerted, or in contradiction of it, and the ſatisfaction expected will be in proportion to the importance of the object, to the degree of doubt attending the teſtimony afforded, and the nature of the opportunities for diſpelling, or diminiſhing it.

But if there is no further opportunity of acquiring an abſolute knowledge

or even when the witneſſes themſelves are together, as is commonly the caſe for ſome time previous to the trial; the cauſe in which they are to be examined becomes the natural and uſual topic of their converſation, and the ſucceſs of it, generally ſpeaking, cannot be a matter of abſolute indifference. Where the wiſhes are anxiouſly engaged in favour of an event, the opinions are ſeldom wholly uninfluenced. A philoſopher ſees in a ſtronger form of view the facts which favour his ſyſtem; an advocate, though avowedly arguing not upon his own impreſſions, but upon the grounds moſt favourable to his client, becomes really impreſſed with the truth of the propoſition which he is engaged to ſuſtain; and a witneſs, under the circumſtances above alluded to, ſees the truth through the meduim of his wiſhes. It is the regular habit of the bar to exclude the witneſſes from their conſultations; in order to prevent their teſtimony being biaſſed by the views which they might receive of the bearings of the cauſe; but the other converſations in which they are engaged preſent that object to their mind. Some practiſers, to inſure the ſucceſs of their cauſe, interrogate the witneſſes again and again, without any ſiniſter motive, and merely with a wiſh to aſſiſt the accuracy of their examination. Others more judicious having once, by careful inveſtigation, informed themſelves of the truth, truſt to the natural and unprepared effuſion of it. It is very eaſy to lay down a general maxim, that a witneſs ought to diveſt himſelf even of involuntary wiſhes, that he ought in the manner, as well as the ſubſtance, of his narrative, to adhere to a ſuccinct, impartial account of the truth; but ſtill the infirmities of human nature will have their operation, and a witneſs, in the ſhort period allotted to his examination, will, in many caſes, with a mind unaffected by the ſlighteſt intention of a wilful deviation from veracity, give an aſpect to his relations derived from the previous influence of his wiſhes upon his opinion; and if this circumſtance will occur, as in numerous inſtances it unqueſtionably will, with reſpect to perſons who are duly ſenſible of the nature of their obligation, how much more extenſive will be the influence of ſimiliar conſiderations, with reſpect to thoſe who are indifferent to it? The inference which I wiſh to deduce from the preceding obſervations, is the propriety of receiving, with adequate circumſpection, that part of the teſtimony which may probably be influenced by ſuch conſiderations as have been alluded to, without unduly diſcrediting the ſubſtantial parts of the relation, which may be entirely free from any rational objection. I am perfectly aware of the general adoption of the maxim, that if the witneſs wilfully deviates

deviates from truth in any particular, the whole credit of his teſtimony is deſtroyed, and ſhall have occaſion more particularly to allude to it; but the true application of the maxim is only referable to thoſe deviations, which reſult from the actual depravity of the mind, and does not extend to its involuntary infirmities. To illuſtrate my general idea by the particular application of it. Two witneſſes may give a correct narrative of the ſame event, ſo far as their moral veracity is concerned, yet leave a very different impreſſion upon the minds of their hearers; the mere manner of narration with reſpect to looks, tones, and geſtures, will produce the difference. The friend of an injured party will deſcribe, with feeling and intereſt, the ſubject of his complaint; his previous ſentiments give the ſubject an exaggerated repreſentation to his own mind, which he communicates to his hearers; the friend of his aſſailant ſees, in a ſtriking point of view, the provocation which to the other had appeared trivial and inſignificant, and the conduct occaſioned by it will appear in very mitigated colours; and from a mere indifference in the mode of his relation, will produce a preciſely oppoſite impreſſion; while an unconnected bye-ſtander will give a repreſentation perfectly accordant with the others in its general ſubſtance, butpreſenting the correct medium between the exceſs of the one, and the extenuation of the other. His own narration will receive a degree of vivacity or ſluggiſhneſs from his conſtitutional character, but will not be influenced by thoſe conſiderations which actuate the others. Wherever, therefore, the judgment and opinion may be involuntarily, and inconſciouſly affected by the habits or relations of the witneſs, a ſuſpicion may be reaſonably entertained of the juſtneſs of his narration, ſo far as the operation of theſe cauſes may be imputed to him, without invalidating the general credit in his veracity.

To this obſervation may be added, the readineſs which appears in adducing what is favourable to the party on whoſe behalf the witneſs feels an intereſt, and a reluctance in diſcloſing what is adverſe to him. I admit the duty of a perfect equality and indifference, but I conceive the deviations from that duty are referable, in many caſes, to the ſources which I have already alluded to. A witneſs is placed in a ſituation to which he is utterly unaccuſtomed, he cannot poſſeſs the preſence of mind, and the compoſure of an indifferent ſpectator, or control at pleaſure, the tendencies of his diſpoſition; the difference of his manner, with reſpect to the two parts of a ſubject, will properly exerciſe the diſcrimination of thoſe who are to decide upon his teſtimony; they will endeavour to correct the effect of his partiality; but will not urge the charge of falſehood and prevarication, beyond the deſigned and

wilful dereliction of integrity. I truſt that I have expreſſed myſelf with ſufficient diſtinctneſs, to prevent its being ſuppoſed that I am becoming the advocate for intentional miſrepreſentation, or deliberate ſuppreſſion; I wiſh only to inculcate the principle of preventing the natural infirmities of the character having a more extenſive influence upon the credit of teſtimony, than they may reaſonably be ſuppoſed to have upon its truth.

There are ſome particular ſubjects, in which the ſuſpicion of involuntary bias in a witneſs will be ſtronger than in others. It will evidently be leaſt in plain matters of fact, as whether a carriage was on the right or left ſide of the road. It will be ſtrongeſt when it relates to manner, as whether the driver, who is himſelf the witneſs, was conducting himſelf properly or otherwiſe. The evidence of converſation and expreſſions ought to be received with very conſiderable circumſpection, ſo far as any thing depends upon its circumſtantial accuracy. It very rarely occurs that two perſons will relate the ſame converſation in the ſame manner. The particular phraſeology of the relator will always blend itſelf with the relation; and nothing is more common than for the impreſſion of converſation to be influenced by the previous diſpoſition of the parties to it or the hearers of it. The accounts which are publiſhed in the news-papers, of the proceedings in parliament, or courts of juſtice, on the day preceding, vary conſiderably from each other, not merely in the taking a more or leſs comprehenſive view of particular parts, but alſo in the ſubſtance of the ſtatement relative to the ſame particulars, and even in the order of the ſpeakers; and the general correctneſs of the repreſentation is very ſeldom aſſented to by thoſe who, from having been preſent, have an opportunity of confirming or contradicting it.

Nothing is more natural than to apply what we hear according to what we wiſh, to conſtrue an expreſſion of civility as an offer of ſervice, the recommendation of a cuſtomer, as a promiſe for the payment of his account. The ſtatute of frauds has interpoſed its authority, to prevent the effect of this miſconception in ſeveral caſes particularly enumerated. The principle of that ſtatute, may be judiciouſly applied to the effect of evidence, in ſeveral caſes without the limit of its proviſions, but ſubject to the miſchief againſt which it was intended as a remedy; evidence of promiſes, and acknowledgments, is almoſt always given by perſons who are in a ſituation which prevents their being abſolutely indifferent reſpecting the effect; and who will, in many caſes, unconſciouſly give a turn to the converſations which they relate, by no means accordant with the impreſſions which the ſpeakers intended to convey. To receive the repreſentations of theſe perſons as literally correct, to conſider

conſider the expreſſions which they relate, as having the ſame authentic certainty as a written document, will therefore, in many caſes, lead to a concluſion repugnant to the truth, and conſequently the attention given to ſuch evidence will, according to the juſt principles of ratiocination, be much leſs than that which is due to the plain affirmative or negative of an unequivocal matter of fact.

There is one kind of teſtimony to which the preceding obſervation emphatically applies, and which is often ſubject to the additional imputation of an intentional want of fairneſs of conduct. I mean the acknowledgments which are obtained by perſons connected with the law, on behalf of the parties for whom they are engaged. Such acknowledgments only deſerve a full attention, when it appears that they were made with perfect freedom, and with perfect plainneſs. The diſengenuous artifices which are made uſe of to entrap a perſon into expreſſions to be uſed in evidence againſt him, the eagerneſs to make a direct and poſitive application of an ambiguous expreſſion, to ſtrain into a promiſe or acknowledgment, what was never intended to convey that impreſſion to the mind, cannot be too narrowly watched, or too ſtrongly diſcountenanced. Nothing is more calculated to excite an unfavourable opinion, than to ſee an attorney ſtand up to ſupport his falling cauſe, by ſupplying all deficiences of proof, from ſome ſuppoſed converſation with the adverſe party; and, according to the apt metaphor commonly applied to the ſubject, pinning the baſket. A reputable attorney will be cautious of engaging in converſation with the adverſe party, except in the preſence of his own profeſſional adviſer, and will be ſtill more cautious in avoiding any unfair repreſentation of it; but however ſtrongly the general reſpectability of the profeſſion may inculcate the propriety of this practice, experience evinces that there are many particular exceptions; and the caution which is adviſable with reſpect to crediting the teſtimony of perſons, whoſe ſituation is in ſome degree a pledge for the propriety of their conduct, becomes requiſite, in a ſtill higher degree, with reſpect to the inferior officers of the law; a ſet of perſons among whom there are many inſtances of probity of character, and propriety of conduct; but who, in general, find their greateſt intereſt in their adroitneſs to ſerve the parties by whom they are engaged. It would tend greatly to advance the credit of all evidence given of ſuch acknowledgments, if they were immediately taken down in writing, and communicated to the party making them; and in caſe any diſſent was expreſſed, or explanation offered, that ſhould be added to the minute; in ſhort, it is deſirable that an accurate memorial ſhould be made of the tranſaction, and of

the demeanour of the party, before the impreſſion of the memory could be perverted; and what is ſtill more important, before the teſtimony could be influenced, by a view of its materiality, derived from the ſubſequent aſpect of the cauſe. The preceding obſervations may be extended, in a remarkable degree, to the inferior retainers of police, who generally feel a ſtrong intereſt in the conviction of perſons charged with criminal offences, and are apt to ſuppoſe their own reputation for aſſiduity and activity connected with that event. It would conduce to the purity of juſtice in this reſpect, if no accounts of the declarations of priſoners to theſe perſons were received upon a trial, which were not ſtated and reduced into writing upon the examination of the priſoner before the magiſtrate, and the priſoner's declaration reſpecting which, at that time, was alſo carefully recorded. The magiſtrates ſhould likewiſe be very particular in ſtating, on the examination, the circumſtances and manner in which the declaration was obtained, and not be ſatisfied with the common-place queſtions, of whether there were any threats or promiſes; ſince the legal objection is, in terms, often carefully avoided, while the ſpirit and principle of it have their full operation and effect. Courts of juſtice, generally, with great propriety direct a jury to lay out of their mind any repreſentation of officers of police, reſpecting the alarm or agitation manifeſted by a perſon, on being charged with any offence, a ſubject which is often very eagerly preſented to them; correctly obſerving, that innocence may not be leſs agitated by an unexpected charge, than criminality alarmed by detection. The evidence of perſons who depoſe to their ſcientific knowledge of any matters in diſpute is, in many caſes, ſubject to be influenced by their wiſhes, in favour of the party adducing them. It has been the obſervation of a great advocate, now advanced to a high judicial ſituation, reſpecting the conflicting teſtimony of ſurveyors produced by the oppoſite parties, that theſe perſons were only advocates upon oath. The courſe of practice certainly furniſhes many inſtances of the truth and propriety of the obſervation; the proper correction of this inconvenience is to apply the attention, rather to the conviction, which theſe advocates produce upon the mind, by the juſtice and conſiſtency of their arguments, than to give to their teſtimony the authority which is due to an indifferent relation of an obvious matter of fact.

The above obſervations will ſufficiently indicate the principle which I have endeavoured to eſtabliſh, in favour of a diſtinction, between the caution which ſhould be applied in the reception of evidence, from perſons who may naturally be ſuppoſed to be not indifferent in the event of an inquiry, and the abſolute diſcredit of their teſtimony.

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The opportunity of obſervation, the accuracy with which that obſervation has been conducted, and the fidelity of memory with which it is related, are alſo circumſtances which ſhould naturally form a material ingredient in the credit which it ſhould receive. It is very certain, that the mind is often deceived by its impreſſions upon theſe ſubjects: and that upon examination and inquiry, its moſt firm opinions are found erroneous; for the truth of which poſition the moſt ſatisfactory teſt will be afforded, by referring each individual to the evidence of his own experience. The well known anecdote of Sir *Walter Raleigh*, who ſuppreſſed the ſecond volume of his *Hiſtory of the World*, upon finding himſelf deceived in the nature of an occurrence, of which he had ſuppoſed that he had an accurate knowledge from his own obſervation, is a conſtant leſſon as to the propriety of a minute examination into the accuracy which the mind of a perſon poſſeſſes reſpecting the ſubject of his relation; but it is a more important caution upon the neceſſity of diſtinguiſhing between miſconception, and miſrepreſentation; and againſt rejecting the general teſtimony, as unworthy of reception from its want of veracity, when the only imputation to which it is juſtly ſubject, is a miſtaken conception reſpecting ſome incidental particular. The diſcordancy of witneſſes upon the ſame fact, is therefore very frequently aſcribed to a mere difference of obſervation or memory. The immediate attention of one perſon being directed to one part of a ſubject, and another to another, a different impreſſion is left upon their minds; each, by the frame and courſe of his attention, will have a leſs lively idea, and a leſs retentive memory, and conſequently will be, in a greater degree, ſubject to the influence of miſtake, with reſpect to that part of the ſubject which has had the ſmaller portion of his regard, than with reſpect to the other upon which his mind has been more immediately occupied. A greater or a leſs degree of attention will alſo be pointed to the ſubject itſelf, without reference to the diſtinction between the different parts of it, according to the mind being in other reſpects free or engaged, according to habit, inclination, or an infinite variety of other cauſes being calculated, or otherwiſe to create an intereſt in the occurrence. Hence will reſult a difference of narrative, which ſo far as it is reſolvable into this cauſe, will rather be an indication of veracity, than induce a ſuſpicion of falſehood. The diſtinction between the inconſiſtency that reſults from repreſentations having no ſolid foundation in truth, and which therefore accompanies every part of a narrative, not included in the previous arrangement, and the variation which may be aſcribed to a difference in the impreſſions of the mind reſpecting a real occurrence, often calls for the moſt judicious diſcrimination. But

though a diſcordancy referable to the cauſes which have been mentioned, is certainly no indication of falſehood, it is ſometimes too ſtrongly relied upon as a manifeſtation of truth, and as demonſtrating that there has been no previous concert; whereas, it is almoſt impoſſible for a previous concert to embrace every incidental circumſtance, which may be introduced into the examination as a teſt of veracity. I conceive that this diſcrepancy is, in general, only a negative quality, leaving the teſtimony of which it forms a part, to ſtand or fall by its merits in other particulars. I have heard of a mode ſometimes adopted, (and the mention of which is not ſo much calculated to promote the practice, as to defeat it,) of giving to a mere fabrication all the circumſtances which will inſure an apparent veracity, by the conſiſtency of the relation, without giving it the appearance of a concerted narrative. It is ſaid, that in order to prove an *alibi*, (a defence the moſt concluſive if true, but the moſt readily counterfeited,) ſeveral aſſociates of the priſoner meet together under circumſtances in which they mean to ſtate the priſoner to have been, the priſoner being repreſented by another perſon; nothing is more eaſy to fix, in concert, than the time to which the relation ſhall refer; and the actual occurrences at this rehearſal form the baſis of the conſiſtency upon the trial. The perſon of the priſoner, and the date of the event, are the only ſubjects miſrepreſented; and every other circumſtance being founded upon truth, will equally ſtand the teſt of examination, as a relation of the moſt ſubſtantial veracity.

I have already alluded to circumſtances, with reſpect to which the impreſſion of the mind is materially influenced by the previous diſpoſition, referring particularly to the report of converſations. The obſervations which were then made will, in many caſes, be applicable where the cauſe alluded to has not any operation, and where the want of accuracy may reſult from cauſes wholly unconnected with any bias upon the teſtimony; of which the principal is the negative cauſe of a want of adequate attention, or perception. How generally does it occur that we miſtake, at the very inſtant, the meaning intended to be conveyed, by expreſſions directed immediately to ourſelves, and of how many private animoſities is this circumſtance the cauſe? How great then is the caution which ought to be applied to the relation of particular expreſſions, to which the hearers, at the time of their occurrence, were in no wiſe intereſted to attend, or which, from their ſituation, they were liable to miſconceive; and how ſlightly does an inaccuracy, or diſcordancy in this particular, affect the general credit of their teſtimony? An inſtance lately occurred of a perſon who depoſed, that he heard a gentleman of high character and reſpectability, the ſecond in a duel

duel which proved unhappily fatal, ſay to his principal, in returning from the field, *By God it does me good*—this was adduced as the indication of a mind peculiarly malignant. The teſtimony did not receive credit, but the gentleman alluded to, upon revolving in his mind what could have been the occaſion of it, recollected having ſaid, with reference to the ſtate of his health, and ſome circumſtances connected with the occurrence of the morning, *This will do me no good.*—Without affirming the authenticity of this latter fact, nothing can be more manifeſt than the probability of the explanation, while on the other hand nothing could have been more improbable, than an intentional falſehood on the part of the witneſs. And if particular expreſſions are ſo liable to miſconception, in the moment of their occurrence, it is clear that the danger of unintentional miſrepreſentation is greatly increaſed by the imperfection of the memory.

Another ſubject upon which many inſtances of miſtake occur, both in the courſe of private experience and of judicial inquiry, is the identity of perſons. Miſtakes upon this ſubject not unfrequently occur, with reſpect to perſons with whom we are previouſly familiar, but with whom we had no immediate communication upon the occaſion related. The mere impreſſion of perſonal reſemblance, in thoſe of whom we had had no previous knowledge, is evidently much more fallacious. Some years ago a perſon was tried at the *Old Bailey* for a robbery, and his perſon was poſitively depoſed to; his defence conſiſted in proving, moſt indiſputably, that at the particular time he was upon his trial, at that bar, upon a different charge. There are a great many modern inſtances of poſitive and ſincere teſtimony upon criminal charges, with reſpect to the identity of perſons, whoſe abſence was manifeſted by the moſt convincing evidence. Upon theſe occaſions, it appears moſt judicious to receive the evidence of identity with conſiderable diſtruſt, unleſs it is accompanied by circumſtances inconteſtibly applying to the particular perſon, who is the object of inquiry already alluded to.

According to the difference of habits, and characters, the minds of individuals are directed with greater or leſs attention to ſubjects of different kinds, and their teſtimony reſpecting theſe is ſuſceptible of correſpondent variations of accuracy; and therefore minuteneſs of recollection, upon one particular of a tranſaction, is not repugnant to a conſiderable uncertainty in another. In ſome, a particular diſtinctneſs with reſpect to dates is contraſted by an unuſual forgetfulneſs with reſpect to names or perſons. Others again have a very imperfect memory with reſpect to all theſe, but a minute recollection of circumſtances. However fair it may be in an ad-

vocate, to take advantage of the variations reſulting from the particular character of the memory, the intereſts of truth require the judge to fix the effects of theſe diſcrepancies at their proper value, to diſtinguiſh between the accuracy and inaccuracy of the different parts of the narration, and to prevent an inaccuracy in circumſtances being miſtaken for a dereliction of veracity in the ſubſtance.

It is the property of the memory, like the attention, to be in general more immediately engaged by particular parts of a ſubject, which preſent themſelves naturally and ſpontaneouſly, whilſt others are only brought into recollection by the effect of exertion, or may lie wholly dormant. It very ſeldom happens that all the circumſtances of a tranſaction occur, with equal readineſs, to the mind; and therefore the omitting to mention a circumſtance in the firſt account, is by no means a convincing argument of its intentional ſuppreſſion. In general, a witneſs comes into a court with the memory ſtrongly bent upon thoſe parts of a cauſe which have occurred to him as material. The revival of other circumſtances is the reſult of a particular examination reſpecting them; and according to the uſual operations of the mind, they will unfold themſelves, gradually at firſt, with indiſtinctneſs, and afterwards with preciſion, unleſs this natural progreſs is prevented by an intimidating and acrimonious courſe of inquiry.

It is to this ground of accuracy of obſervation and recollection, that the preference of poſitive to negative evidence is principally to be referred; for it is much more probable, that a perſon may not have obſerved an occurrence which actually did take place, or having obſerved it, may not have recollected it, than that another ſhould imagine circumſtances which had no foundation in exiſtence; and it is only to this kind of negative, which is accounted for by the want of obſervation or recollection, that the preference properly applies: for, if the ground of denying the truth of an aſſertion is an actual poſitive obſervation in oppoſition to it, this teſtimony is, to all rational purpoſes, as much affirmative, as that which it is oppoſed to. Thus, if a witneſs alleges a perſon to have been drunk at a given time, and another declares that he was not drunk; it is an affirmative declaration that he was ſober, and the weight of credit muſt be decided according to other circumſtances. A diſtinct account from the witneſs aſſerting the party not to be drunk, that he had been in a coach with him all night, and for ſeveral hours in the morning, up to the time in queſtion; and that he had not taſted any intoxicating liquor, would be more convincing than the general declaration of a ſtate of drunkenneſs. With reſpect to the permanent nature of a ſubject, negative evidence is as ſtrong as affirmative, if the nature of the ſubject is ſuch that

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the former is equally free from the ſuſpicion of error with the latter. A perſon ſwearing that there is no bridge over the *Thames*, between *London* and *Blackfriars*, would be entitled to as much attention, as another ſwearing that there is a bridge between *London* and *Weſtminſter*; and the ſame obſervation, which is ſo palpable with reſpect to the inſtances alluded to, ought equally to prevail in other caſes referable to the ſame principle.

It ſometimes occurs, that a witneſs, having a given fact propoſed to him, will not ſwear poſitively to the non-exiſtence of it; when the fact is of ſuch a nature, that if true, it cannot be ſuppoſed but that he muſt have known and recollected it. Thus if a witneſs was aſked, whether ſince the commencement of the trial, he had told a perſon preſent that he was come to perjure himſelf; there can be no doubt but that he can with ſincerity only anſwer yes, or no; but there are many caſes in which it is equally evident, to thoſe capable of forming an adequate judgment, that the recollection of the exiſtence, or non-exiſtence of a given fact, muſt be perfectly diſtinct; but in which the witneſs, from a ſuperabundance of caution, expreſſes himſelf with doubt and heſitation; and in fact I obſerve this kind of heſitation to be very general, in perſons of confined habits of thinking when examined upon ſuch topics. They are then plied with a ſet of queſtions about, *If it had been ſo, muſt you not have recollected*, &c. &c. aſked in a manner which encreaſes their embarraſſment; but the anſwer to which is not ſo much an act of teſtimony as of reaſoning. Where proof is actually given of a fact, that the witneſs could not but know and recollect, his expreſſing himſelf in terms of doubt and uncertainty, is to be regarded as an act of wilful miſrepreſentation; on the other hand, if no ſuch proof is given, and the teſtimony is, in other reſpects, unſuſpicious, and the witneſs is not a perſon who, from his ſituation and underſtanding, cannot but be aware of the power of giving a direct affirmative, or negative; it ſhould be taken as the reſult of his teſtimony, that the fact did not exiſt; or at all events, it ſhould not be taken for granted that it did, from a witneſs declaring that he could not ſwear that *it was not ſo*.

Evidence of reaſoning is alſo referable to the ſame general topic. A witneſs's teſtimony of a fact may be poſitive, though the reaſon he expreſſes for it is falſe or abſurd. I have heard a witneſs, when croſs-examined, as to his reaſon for knowing cloaths which had been ſtolen from him, refer to a matter of general deſcription, which of courſe was followed up with, *Had no other perſon ever cloaths of that deſcription?* The judge, in his obſervations to the jury obſerved, that a witneſs, in aſſigning reaſons for facts of which he muſt have a poſitive knowledge, as

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the identity of his own cloaths, often gave the worſt reaſon that could be imagined; but the abſurdity of the reaſon aſcribed, did not diminiſh the weight of the teſtimony of actual knowledge. But where the evidence neceſſarily reſolves itſelf into matter of reaſoning, the caſe is materially different, for there the failure of the reaſon prevents the ſubſiſtence of the concluſion which is founded upon it. To inſtance a caſe which occurred in the ſame Court with the preceding. A witneſs ſwore that a perſon examined on the other ſide, was not fit to be believed upon his oath; and being aſked his reaſon ſaid, that he had never made a good fence ſince he came to his farm.

Where a witneſs is examined as to his reaſon, intention, or opinion upon ſome paſt occaſion, it will often happen that he ſtates ſuch reaſon, as appears to him moſt plauſible at the time of his examination. If the reaſon inquired for relates to ſome poſitive fact out of the ordinary courſe of occurrences, the reaſon and motive can be, in moſt caſes, remembered, with as much diſtinctneſs and accuracy as the fact; but I have known perſons interrogated with ſome ſeverity, as to their reaſon for not doing ſomething, to which the nature of the thing ſupplies the anſwer, that no adequate motive occurred to induce them actually to do it; but the witneſs, perplexed, and confuſed by the queſtion, will, in an indiſtinct and heſitating manner, give ſome anſwer which induces an unfavourable impreſſion with reſpect to his veracity. This obſervation occurred to me in hearing a trial, where a witneſs who had made a ſhaft, for the purpoſe of getting brine under the land of the defendant, made certain obſervations and experiments, to aſcertain that he did not carry it under the land of the plaintiff, and theſe obſervations being ſuch, as if true, were, from the nature of the ſubject, concluſive with reſpect to the inference deduced from them, he was interrogated as to his reaſons for not doing various other things ſuggeſted to him at the trial. Sometimes an intention is inquired into, reſpecting an occurrence at a diſtant period, upon which, in all probability, there did not exiſt any intention at all; as where a perſon, who had 40 years before engaged her ſon to ſerve another for a given time to learn a trade, was aſked, whether ſhe did not intend that he ſhould be an apprentice? To this, being, as uſual, deſirous of getting to an end of her examination, ſhe anſwered, *yes*; whereas it was highly improbable that ſhe ſhould have any intention, with reſpect to thoſe diſtinctions between ſervice and apprenticeſhip, which have been introduced into the ſettlement law; inſtead of merely deſigning that there ſhould be a ſervice and inſtruction upon the terms agreed upon, according to which terms the ſon would have acquired a ſettlement by ſervice;

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yet from this anſwer, *yes*, a bench of juſtices was induced to decide the contract to be a defective apprenticeſhip.

And here it may be proper to advert to a diſtinction, which has often occurred to me, and was referable to the preceding caſe, between the words uſed by, and proceeding from the witneſs as his own, and his giving an anſwer of *yes*, or *no*, to the queſtion propoſed to him; the former being the indication of his own impreſſions and recollection upon the ſubject of inquiry, the latter being the reſult, the adoption, or rejection of an extrinſic ſuggeſtion. It is therefore not an accurate repreſentation of the teſtimony of a witneſs, to ſtate that he had given a narrative in language apparently his own, when he had merely given an affirmative or negative anſwer to the language of another. Such a converſion of expreſſions can only be an adequate delineation of the teſtimony, upon the ſuppoſition of the witneſs having diſtinctly and fully comprehended the language preſented to him, and of his aſſent or diſſent to it, being a perfect repreſentation of the ideas previouſly exiſting in his mind. There is a peculiar danger of this kind of perverſion, when a ſummary, and *ex parte* repreſentation, taken at one time, is introduced in evidence at another.

The preceding obſervations have been chiefly referable to teſtimony upon mere matters of fact, but theſe are often blended with matters of judgment; and the latter are themſelves, in many caſes, the ſole object of examination. The adequacy of the judgment muſt therefore be aſſented to before any confidence can be placed in the reſult of it; and this confidence will depend upon the apparent or acknowledged talent of the witneſs, and his opportunity of forming an adequate opinion, which latter circumſtance will be materially influenced, by the nature of the ſubject to which it is applied. In general, every perſon exerciſing an occupation is ſuppoſed to be converſant with the ſubject of it, and his opinion is abided by, unleſs contradicted by others intitled to an equal confidence; or unleſs there are intrinſic circumſtances for diſputing it; *cuilibet in arte ſua credendum eſt.*

But upon the conflict of teſtimony, a judgment is often to be pronounced according to the apparent relative competence of the reſpective witneſſes; this judgment ought not to be haſtily referred to the fluency of their expreſſions, or the plauſibility of their manner; ſince a patient attention will often perceive, that the moſt accurate knowledge is not always accompanied by the greateſt facility of communicating it. The opportunity which reſults from the actual obſervation of a particular ſubject, is evidently more to be relied upon, ſuppoſing the judgment to be equal, than that which is founded upon relation, and much more than

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that which is referable to mere hypotheſis. A conſiſtency with undiſputed facts is one of the moſt advantageous teſts, of the confidence which ought to be repoſed in the deciſions of the judgment, but it is often dangerous for thoſe who are to decide, acting upon their own inadequate conceptions, haſtily to deduce a charge of inconſiſtency, in oppoſition to the opinions of technical experience. Wherever ſuch an inconſiſtency is ſuppoſed to exiſt, it ſhould be fully pointed out, for the purpoſe of receiving ſuch elucidation as the witneſs may be enabled to afford, without reſerving it for matter of ſubſequent obſervation, which may probably be erroneous.

The teſtimony of a witneſs, with reſpect to ſubjects upon which he has a peculiar knowledge, is ſometimes received with diſſatisfaction on account of his depoſing to the exiſtence of diſtinctions, or *criteria*, which are not perceptible to thoſe by whom he is examined; and which, becauſe they cannot diſcern, they will not ſuppoſe to exiſt; but this is an improper ſtandard of judgment, for every perſon can, with inſtantaneous facility, diſcover the caſual variations in ſubjects with which he is habitually familiar, and theſe in circumſtances ſo minute that they would not be ſuſceptible of communication to a common obſerver. The *Arab* or *Indian* will trace, through the foreſt or deſert, the footſteps of which the members of cultivated ſociety cannot diſcern the ſlighteſt impreſſion. The mariner will deſcribe the particulars of a veſſel, which to the paſſenger appears a ſpeck in the horizon; the lawyer, and the phyſician in the objects of their reſpective profeſſions, the botaniſt in his plants, the chemiſt in the contents of his laboratory, will perceive a materiality in diſtinctions, of which, to thoſe who are unaccuſtomed to their different purſuits, they cannot convey an intelligible deſcription. The mind in weighing the capacity of an expert, with relation to the ſubject of his art, ſhould not decide upon the apparent uncertainty of the new and adventitious object of its attention, but upon compariſon with its own facility of obſervation, upon ſubjects with which it is moſt familiarly converſant. There are few ſubjects in which, independently of experience, or the concluſions of preciſe and accurate reaſoning, there would be a greater apprehenſion of uncertainty, or a ſtronger ſuſpicion of gueſs and conjecture, than the art of decyphering, yet it is an art which, (at leaſt in its loweſt application, of a ſubſtitution of letters,) depends upon principles as certain, and almoſt as eaſy of communication, as the loweſt rule of arithmetic. The weakneſs of thoſe who circumſcribe the bounds of poſſibility and veracity by the limits of their own perception, is often illuſtrated by applying the fable of the horſe, who was torn to pieces, for aſſerting in the torrid zone, that in other climates the men were whit,

white; and that paſſengers could travel over the ſurface of rivers.

There are alſo many caſes in which witneſſes ſpeak from judgment and opinion, without reference to any technical knowledge; ſuch, for inſtance, is evidence of character, and all other teſtimony amounting to a general concluſion upon particular facts; when this concluſion is accompanied by a narrative of facts from the ſame witneſs, the ſufficiency of the concluſion is a matter perfectly diſtinct from the reality of the facts; an advocate who would impeach the veracity of the facts, makes but little progreſs, by ſhewing the weakneſs of the concluſion, and on the other hand, the advocate who relies upon the facts, is not precluded from diſputing the concluſion. This may be illuſtrated by the following caſe, which I have known to occur in practice; a perſon depoſed to having entered into a ſervice under circumſtances which, in point of law, would amount to a general hiring, which is equivalent to a hiring for a year; but ſhe alſo declared that ſhe was not hired at all; the latter part of her teſtimony was evidently no more than the judgment of an ignorant witneſs, as to the legal import of the term *hiring*, to which ſhe attached the idea of an engagement made in a certain manner, or for a certain time expreſsly mentioned; but it was contended and ſucceſsfully, in a Court of Quarter Seſſions, that it was impoſſible to pronounce in favour of the acquiſition of a ſettlement upon this evidence, as the witneſs upon whoſe teſtimony the whole depended, declared that there was not any hiring, and thoſe who produced her, and relied upon her evidence, were bound to take the whole together.

In deciding upon the truth of evidence, much ſtreſs is laid upon the inherent probability of it, a criterion which, within its proper limits, is attended with great utility, but which, like all other general *criteria*, may be carried too far; for where a teſtimony is direct and poſitive, where the circumſtances to which it relates are palpable and not calculated to excite deluſion, where the witneſs had a perfect opportunity of knowledge, where he has no motive to miſrepreſent, and ſtill further, where the repreſentation militates againſt the uſual motives of conduct; where ſeveral witneſſes, of unimpeached integrity, free from all ſuſpicion of colluſion, ſpeaking from detached and uncommunicated knowledge, concur in the atteſtation; where the fact atteſted concurs with other undiſputed phænomena, not reconcileable with the ſuppoſition of its falſehood; the previous and inſulated probability of the fact aſſerted is a leſs powerful motive for the deciſion, than the poſitive conviction reſulting from the force of the teſtimony; the rejection of which would be founded upon a much higher degree of improbability, than

than that which it profeſſes to correct. Such I conceive to be the ſummary of the argument, which is uſually applied to a ſubject of a much ſuperior nature to that of my preſent inveſtigation, but the principles of which may be properly adapted to inferior objects of ordinary diſputation. It is ſeldom that a caſe will occur, in which the improbability of falſehood will advance to that high degree of certainty, which is involved in the preceding enumeration, but each of the circumſtances alluded to will have their influence in forming a deciſion between the abſtract improbability of the fact related, and the particular improbability of the immediate relation under all its circumſtances being falſe. I have witneſſed ſeveral caſes which called for the practical application of this diſtinction; the one which at preſent occurs to me, is an action againſt a man for ſowing the field of another with dock ſeeds; a fact which was poſitively ſworn to by a caſual obſerver, and confirmed, amongſt other circumſtances, by the growth of the docks, in the courſe which he had taken; it was contended to be highly improbable, that any man ſhould be guilty of ſuch malignant conduct; but it was anſwered, that it was much more improbable that the witneſs, who had no connection with the one party, or animoſity againſt the other, ſhould gratuitouſly involve himſelf in perjury, in atteſting the fact which was ſo corroborated.

A topic connected with the preceding obſervations, which relate to the ſubject of the teſtimony, as exiſting in the mind of the witneſs, and intended to be the object of his repreſentation, is the correctneſs of the language uſed by the witneſs in conveying his ſentiments, and of his conception of the queſtions propoſed to him. The degree of accuracy with which the language repreſents the ſentiments, is a proper ſubject of inquiry, before the terms made uſe of are conſtrued with too literal preciſion; and the incorrectneſs of language, or conception, ſhould be carefully diſtinguiſhed from miſrepreſentation or evaſion; an obſervation which might ſeem to be unneceſſary from its obvious propriety, and the little danger which may be ſuppoſed to exiſt of a contrary practice. But the fact is otherwiſe, and a mutual miſconception, either real or affected, is frequently the ground of cavil on the one ſide, or the ſcreen for equivocation on the other. When the latter is the fact, it is very ſeldom ſucceſsful, the equivocation is kept up for a ſecond or two, and the expoſure of it, very properly, throws a general diſcredit on the whole teſtimony of the witneſs; but the want of a patient and temporate attention, may often permit this imputation to fall where it is not juſtly merited, and where a careful examination of the meaning intended to be expreſſed would completely remove it. What has been before obſerved with reſpect to language as being

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the ſubject, may, in ſome degree, be applied to it as the medium of evidence; but the error reſulting from its inaccuracy or miſconception is, from the difference of the occaſion, much more eaſily ſuſceptible of correction. Peculiar modes of ſpeech, either perſonal or provincial, metaphorical language, a greater or ſmaller latitude in the acceptation of terms, the mutual ſubſtitution of definite and indefinte expreſſions, are ſome of the cauſes which contribute to the uncertainty at preſent under conſideration. In ſome parts of the country, it is, with perſons in the inferior ſtation of life, an ordinary mode of ſpeech to ſay, that they believe a fact, of which they have the moſt poſitive aſſurance. When this expreſſion ſlips out on a judicial examination, we commonly hear the queſtion, *Believe! are you not ſure of it?* and an anſwer in the affirmative is followed up with, *then why do you ſay you believe?* A queſtion very proper, when there is a ſuſpicion that the terms of the anſwer were intentionally evaſive; but the corrective is frequently applied, when in fact the cauſe of complaint does not exiſt. Sometimes, the mode of phraſeology which gives an exaggerated or extenuated repreſentation of a ſubject, without any conſciouſneſs of an intention to deceive, originates from thoſe views of a ſubject which are connected with a diſpoſition reſpecting the event, and which have already been the ſubject of obſervation.

The ſame general obſervation, which has already been ſo often traced in its different applications, of a diſtinction between inaccuracy and miſrepreſentation, applies to the conviction ſubſiſting in the mind from the repreſentation of others, where the fact is regarded as certain, and is repreſented as exiſting, although the ſource of the witneſs's knowledge prevents its being a matter of legitimate evidence. I conceive that this inaccuracy often eſcapes undetected; the witneſs ſpeaking in general terms of the exiſtence of the fact, and there being no ſuſpicion of his doing ſo otherwiſe than from his own obſervation. Some facts we ſpeak of as aſſuredly true without objection, of which our knowledge is almoſt neceſſarily derived from reputation, as, for inſtance, the death of a perſon; the ſuppoſed notoriety of ſome other facts, induces us to think and ſpeak of them with the ſame degree of aſſurance as of this, which, though an infraction of the legal rules of evidence, is no tranſgreſſion of the moral obligation of veracity, although it is ſometimes repreſented as ſuch, in the courſe of a captious croſs-examination.

The manner and deportment of witneſſes is very commonly a principal ground of aſſent to, or diſſent from their teſtimony; and is doubtleſs a very natural indication of the exiſtence or the want of ſincerity. That the diſpoſition of the witneſs will have an influence on

his manner is undiſputed; the adequate obſervation of it is however a matter requiring the moſt ſkilful and judicious diſcernment; the detection of affected plauſibility, and the aſſiſtance of conſtitutional timidity, are objects which reſpectively import, in an eminent degree, the proper adminiſtration of juſtice. A perfect judgment of the cauſes of a perſon's demeanour upon a particular occaſion, can only be formed by thoſe who have a previous knowledge of his general habits and character, and in this reſpect an intelligent jury is of great advantage; ſince being aſſembled from different parts of the country, ſome of them will, in moſt caſes, have at leaſt a general knowledge of the witneſſes who appear before them. It would be greatly beyond the limits of my power, to trace even a ſlight outline of this extenſive ſubject, but a few detached obſervations, founded upon my impreſſions reſpecting it, may not be wholly irrelevant. In deciding upon the demeanour of a witneſs, conſiderable allowance is to be made for the unaccuſtomed ſituation in which he is placed, and the impreſſions which it may be calculated to make upon his mind. To ſome perſons this public appearance is a matter of indifference, but by many it is regarded with an apprehenſion, productive of embarraſſment and agitation, which, to unſkilful obſervers, may appear the reſult of inſincerity. This embarraſſment will ſometimes attach itſelf in a peculiar degree, to thoſe who are accuſtomed to appear before the public in a different ſituation, and who are therefore habitually anxious reſpecting the impreſſion which they may induce. It is an anecdote of *Garrick*, that when examined as a witneſs reſpecting the nature of a free benefit, he was incapable of giving an intelligible teſtimony. In deciding upon the demeanour of witneſſes, much attention is due to the mode of interrogation, and the popular opinion reſpecting the perſon who is engaged in it. An aſperity in the particular conduct of the counſel or the judge, or even the reputation of it with reſpect to the former, will neceſſarily produce an effect upon the ſenſations and deportment of the witneſs; and an apprehenſion of the ridicule which frequently affixes itſelf permanently to the character, is often a predominant ſenſation of the witneſs upon his examination. Good ſenſe, when fully exerciſed, will correct theſe apprehenſions, and ſatisfy the witneſs that violence and ridicule will be ineffectual, when oppoſed to the plain and unaffected language of truth; but the dictates of good ſenſe are often an inſufficient preſervative againſt conſtitutional timidity.

A reſolution to appear undaunted, and repel the expected aggreſſion of counſel by inſolence, a fooliſh inclination to make a theatrical exhibition of wit and humour, exciting the horſe-laugh of the bye-ſtanders, a moroſeneſs and ſullenneſs of temper, will give

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an unfavourable aſpect to the manner of a witneſs, when there is no intentional want of veracity in the matter. The real abſurdity of a witneſs's demeanour or mode of repreſentation, will often diminiſh the proper impreſſion of the facts for which it is neceſſary to reſort to his teſtimony, and particularly in caſes where there is a latitude of diſcretion, as in queſtions of damages; the judgment is often practically biaſſed, by the ſentiment of ridicule being a teſt of truth. A due regard to the principles of juſtice will however prevent the fair demands of a party from being affected by the ſullenneſs or abſurdity of the witneſſes, whom he is neceſſitated to adduce in ſupport of it; and will lead the mind to a ſtudious diſcrimination, between the fact which is the ſubject of inquiry, and the accidental circumſtances which may accompany the relation of it.

The judgment upon a witneſs's manner is not unfrequently framed by a contraſt between a cool and ſteady narration, and a fluttering heſitation; this judgment may, however, often be fallacious, for a witneſs who has prepared his ſtory, may have ſufficiently arranged the particulars of it in his mind, while another who has an opportunity of contradicting it, if falſe, is ſurprized and confounded by the unexpected ſtatement. In a caſe where I had an opportunity of knowing the real facts, I have ſeen a witneſs give a ſteady and collected repreſentation of a ſuppoſed converſation in a perfectly ſimple and unaffected manner; the oppoſite witneſs, when ſuddenly interrogated as to the exiſtence of ſuch a converſation, began with, *Not that I recollect, I do not believe it upon my honour*, and a great many other exclamations in ſuch a confuſed, ſuſpicious manner, that even thoſe who, from their private knowledge, had the moſt indiſputable confidence of the veracity with which he told them upon coming out of court, that there was not a ſyllable of truth in the converſation related, perfectly acquieſced in the propriety of a deciſion founded upon the opinion of his falſehood.

The following paſſage from *Lavater* is not inapplicable to the purpoſe of the preſent inquiry. After remarking that guilt is probably more daring than innocence, but the voice of innocence has greater *energy and more convincing powers*, the look of innocence is more ſerene and bright than that of the guilty liar; he ſtates an inſtance of two young perſons, who more than once came before him, and moſt ſolemnly affirmed, the one, "Thou art the father of my child," the other, "I never had any knowledge of thee." On the one hand, ſays he, I beheld the perſuaſive look of innocence, the indeſcribable look that ſo expreſſively ſaid, "And dareſt thou

deny it!" I beheld on the contrary, a clouded and inſolent look, I heard the rude, the loud voice of preſumption, but which, like the look was unconvincing, hollow, that with forced tones anſwered, "Yes, I dare?" I viewed the manner of ſtanding, the motion of the hands, particularly the undecided ſtep, and at the moment when I awfully deſcribed the ſolemnity of an oath, at that moment I ſaw, in the motion of the lips, the downcaſt look, the manner of ſtanding of the one party, and the open, aſtoniſhed, firm, penetrating, warm, calm look, that ſilently exclaimed, *Lord Jeſus!* and wilt thou ſwear? "I ſaw, I heard, I felt guilt and innocence." A citation from *Lavater* will be thought rather a ſingular occurrence in a law book, but it will not be here irrelevant to obſerve, that whatever opinion may be formed of the philoſophical ſyſtem of Phyſiognomy, the practical influence of it is extremely extenſive, both in the common intercourſe of life, and in the adminiſtration of juſtice. Mr. *Balmanno* has introduced, by way of note to Sir *Wm. Jones's Law of Bailments*, the following paſſage from *Halhed's Code of Gentoo Laws*, which is not inappoſite to our preſent purpoſe. "When two perſons, upon a quarrel, refer to arbitrators, thoſe arbitrators, at the time of examination, ſhall obſerve both the plaintiff and defendant narrowly, and take notice if either and which of them, when he is ſpeaking, hath his voice faulter in his throat, or his colour change, or his forehead ſweat, or the hair of his body ſtand erect, or a trembling come over his limbs, or his eyes water; or if, during the trial, he cannot ſtand ſtill in his place, or frequently licks and moiſtens his tongue, or hath his face grow dry, or in ſpeaking to one point wavers and ſhuffles to another, or if any perſon puts a queſtion to him, is unable to return an anſwer, from the circumſtances of ſuch commotions they ſhall diſtinguiſh the guilty party."

That teſtimony is very open to ſuſpicion, which is given by a perſon who is evidently meditating upon the materiality and tendency of his anſwer, before he will let it be given (*a*); or on the other hand who bolts out with precipitancy, before he hears the queſtion, an anſwer indicating a catechiſed preparation; the effect of either of theſe circumſtances ſingly is greatly increaſed by their combination in different parts of the ſame teſtimony. But even that previous ſtudy of an anſwer, which has been mentioned, will have a different effect, according to the character, and ſituation, and habits, of the perſon who is examined. I have, in an earlier part of this diſcuſ-

(*a*) A *Welch* witneſs who intends to give unfair teſtimony, always affects an ignorance of the *Engliſh* language, in conſequence of which the effect of croſs-examination is not only weakened by the intervention of an interpreter; but the witneſs has time to collect and prepare his anſwers.

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ſion, taken notice of circumſtances calculated to influence the diſpoſition, and which, though by no means juſtifying prevarication in any caſe, diminiſh the ſuſpicion of a want of ſubſtantial veracity, which reſults from a want of propriety in incidental particulars. The ſuſpicion of fabrication riſes higheſt, when the witneſs is one of thoſe inferior retainers of the law, who are commonly attendant upon courts of judicature, who have a cunning acuteneſs in the obſervation of its proceedings, and who, from their occupation, are frequently in the habits of ſwearing to facts, in their own nature liable to miſrepreſentation, and placed beyond the reach of detection or contradiction.

The general character of witneſſes is alſo a circumſtance which has naturally a conſiderable influence upon the credit of their teſtimony; and we ſhall have occaſion to mention, in a ſubſequent ſection, certain caſes in which the teſtimony of perſons convicted of particular offences is abſolutely excluded, upon a legal preſumption, that thoſe who have been capable of ſuch acts will not be influenced by any moral or religious obligation to adhere to the dictates of truth, when any circumſtances may occur to influence their minds in oppoſition to it. I think it is by no means deſirable to extend this principle of excluſion, for, in general caſes, the rejection of any perſon as a witneſs does not operate to the prejudice of himſelf, but of the public or private intereſts which may be concerned in the diſcloſure of the facts of which he has a knowledge; and even in the moſt depraved members of ſociety the natural influence of truth, and the temporal riſques of perjury will be a ſecurity againſt the commiſſion of gratuitous falſehood. But wherever there is reaſonable ground to ſuppoſe a bias in the mind, with reſpect to the effect of the teſtimony, a previous criminality of conduct will very juſtly excite ſuſpicions of its veracity; and the mind will naturally refuſe its aſſent to declarations made by thoſe whoſe diſpoſition in favour of the event cannot be ſuppoſed to be counteracted by a ſuperior ſenſe of obligation. I have already obſerved, that to aſſent to a given propoſition we require a preponderance of teſtimony in ſupport of it; in queſtions therefore reſpecting the credit of a witneſs, the want of aſſent is not founded upon an aſſurance that his teſtimony is falſe, but from the want of an adequate aſſurance that it is true. Where it is diſtinctly aſcertained that the witneſs is indifferent with reſpect to the event, or where it appears that his wiſhes would naturally induce in oppoſition to his teſtimony, the general inclination to veracity might be, in moſt caſes, a ſufficient aſſurance of the facts depoſed to by a perſon even of the moſt exceptionable character; but the teſtimony

will be properly open to ſuſpicion, not only when a perſon of this deſcription diſtinctly appears to have a collateral motive for deſiring a deciſion in ſupport of his teſtimony, but alſo whenever there is not a ſufficient reaſon for preſuming the contrary; for the inducements which may operate upon a mind ſuſceptible of corrupt influence cannot eaſily be detected, although they may actually exiſt. It is the want of an adequate aſſurance that the teſtimony is true, which very properly occaſions a great degree of caution to be applied to the teſtimony of accomplices in criminal proſecutions; and induces courts, and juries, to diſregard ſuch teſtimony, except ſo far as it is confirmed by circumſtances affecting the parties accuſed, depoſed to by witneſſes of irreproachable character. There is not in theſe caſes a poſitive ſuſpicion, ariſing from the nature of the evidence itſelf, that it is actually falſe; but there is a manifeſt want of thoſe principles of duty and obligation, which are the ſtrongeſt aſſurance of its being true; the actual motive is almoſt always in favour of truth, if it is clear that the witneſs had ſome companion in his offence; and it has not, in any inſtance, occured to me, to ſuſpect that evidence of this deſcription, which I have had an opportunity of hearing, was fabricated; but there is no doubt that it frequently might be ſo, if a leſs jealous caution was exerciſed in its reception.

It is an eſtabliſhed rule, that witneſſes examined with a view to diſcredit the teſtimony of others, cannot be admitted to depoſe to particular facts of criminality, but can only expreſs their general opinion, whether the party is or is not entitled to be believed upon his oath; but the other ſide, who, to ſupport the teſtimony, may inquire what are the reaſons of diſbelief, which ſometimes, as in a caſe above adverted to, are ridiculous enough. If it is declined to inquire into theſe reaſons, there is pretty conſiderable ground to preſume a conſciouſneſs that the opinion is founded upon adequate motives. I have heard witneſſes aſked, whether they had ever known the perſons againſt whoſe veracity they depoſe, give falſe evidence in a court of juſtice; and upon their anſwering in the negative, it was intimated to the jury, that the teſtimony to their diſcredit was abſolutely frivolous; whereas, if the queſtion had been, what were the reaſons upon which the diſcredit was founded, a fraudulent conduct might have been ſhewn which indicated the want of moral and religious principle, and conſequently affected the ſtrongeſt ground of reliance upon teſtimony. When witneſſes ſpeak to the character of others, not only their own character, but their ability, and opportunity to form an adequate judgment, are circumſtances very proper to be taken into conſideration.

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It is a rule of law, that witneſſes cannot be aſked any queſtions which tend to ſubject themſelves to puniſhment, or as it is uſually expreſſed to criminate themſelves; but whether they may be aſked if they have already received a puniſhment, which does not diſqualify their teſtimony, or whether they may be interrogated as to any circumſtances of improper conduct, not immediately connected with the ſubject of their examination, and alſo, whether their refuſal to anſwer inquiries upon theſe ſubjects can be obſerved upon as affecting the credit of their teſtimony, are queſtions of great importance upon which there is a very conſiderable difference of opinion. Some judges are very ſtrongly of opinion, that theſe inquiries ought not be allowed; but it has been underſtood to be the more prevalent opinion of the bench, as it certainly is very generally the opinion of the profeſſion, that they are admiſſible and proper; and this latter opinion is clearly ſupported by the courſe of practice which has actually prevailed. Mr. *Peake*, in the ſecond edition of his *Law of Evidence*, ſtates the arguments in ſupport of theſe oppoſite opinions, in a very fair and perſpicuous manner; and the right and propriety of the examinations alluded to are maintained with conſiderable ability in a phamphlet intitled, *An Argument in favour of the Rights of Croſs-Examination*. I have at all times felt a very conſiderable difficulty in the conſideration of this ſubject; but as a knowledge of a witneſs's habits and purſuits, his conduct and diſpoſition, will naturally influence the regard which is paid to his aſſertions; I think that the preponderance of argument is in favour of the opinion, that an examination, by which theſe may be aſcertained cannot, upon any general principles, be ſuppreſſed as irrelevant or improper; and that thoſe arguments reſpecting a witneſs's conduct ought not to be rejected, which may tend to determine the regard that the mind, without reference to technical rules, or legal conſiderations, would pay to his teſtimony. At the ſame time, I think that this is a liberty which, like all others, will be beſt ſecured by a cautious vigilance in repreſſing its abuſe, by a refuſal of advocates to adopt the paſſions, and prejudices of their clients, and to injure a witneſs by reproaches and inſinuations, that cannot reaſonably be expected to influence the fair deciſion of the cauſe; and by the Court ſhewing a marked diſcontinuance to the adoption of a different line of conduct, calculated only to occaſion an unneceſſary pain and injury to the witneſs, without promoting the rights or intereſts of the party.

The ſituation of a witneſs in life is alſo a circumſtance which frequently influence the regard that is paid to his teſtimony, eſpecially with reſpect to matters of judgment and obſervation;

and even with reſpect to mere veracity it is not wholly indifferent; for although, in the abſtract, the teſtimony of every perſon is to be regarded as true, and the ſenſe of obligation may be equally ſtrong in every condition of ſociety; the temporal diſadvantages ariſing from the detection of falſehood or prevarication, independent of the terrors of legal puniſhment, will frequently depend upon, or be connected with a perſon's rank and ſtation; and therefore all conſiderations of credit, connected with the evidence itſelf, will be, and conſtantly are, materially influenced by this circumſtance. The effect of a bias in favour of the event of a cauſe, reſulting from the ſituation of a witneſs, will be more or leſs ſtrong in proportion to his being more or leſs ſubject to temptation; the compariſon between the relation itſelf and its probability, will be made with greater minuteneſs, in proportion to the ſtake in ſociety which is engaged in ſupport of its veracity. The influence of ſituation is moſt ſtrong in caſe of conflicting teſtimony; for ſuppoſing other circumſtances to be equal in every reſpect, there is no doubt but that a conſiderable diverſity of ſituation would have conſiderable influence in directing the balance of credit; and to illuſtrate the poſition by an extreme inſtance, few perſons would heſitate in regarding the narrative of a clegyman on the one ſide, with ſuperior credit, to that of a bailiff's follower on the other.

The number of witneſſes, and their concurrence in ſupport of a given aſſertion, is alſo a ſubject of material importance in deciding upon the credit of their teſtimony; for the improbability of two witneſſes concerned in the ſame falſehood, or being influenced by the ſame miſtake, is much leſs than that of the falſehood or miſtake of either of them individually; and the improbability increaſes in proportion with the number. But in the contraſting of contradictory teſtimony, the mere conſideration of number is held ſubordinate to that of the indications of individual veracity, and the maxim that *ponderantur, non numerantur teſtes*, is of very frequent practical application. Other circumſtances being equal, the preponderance of numbers is certainly intitled to the advantage, and ſometimes this preponderance will be ſufficiently great to counterballance an apparent ſuperiority in other circumſtances on the oppoſite ſide; and although nothing can be more remote from the ſubject in diſcuſſion than the application of the ſtrict rules of mathematical equality or proportion, a fair attention to the principles of thoſe rules is often of conſiderable importance. The degree of influence or indifference of the reſpective witneſſes, their apparent veracity, their demeanour, their character, their ſituation, the probability of their relation, are circumſtances, all of which

which are to be carefully and attentively brought into the account. The opportunity of confederacy, or the want of ſuch opportunity, is a moſt important conſideration in determining the effect of numbers. The concurrence in ſpeaking of one obſervation of one detached fact, is of much inferior value to the concurrence of perſons ſpeaking from detached and ſeparate obſervations, of different facts leading to the ſame concluſion. I have already had occaſion to advert to the accordance or variation of witneſſes ſpeaking of the ſame occurrence, to the difference between that inconſiſtency which eſſentially faſtens itſelf upon the ſubſtance of the relation, andthat which may be fairly referable to different degrees of accuracy or minuteneſs, in the obſervation or memory of facts which have actually occurred; and to the unity and accordance, which being too ſtrict and circumſtantial, are inconſiſtent with that diverſity of obſervation and expreſſion, that naturally occurs in the unprepared account of a real tranſaction, affords an indication of concert and deſign (*a*). It is not an unfrequent obſervation, that if one of the witneſſes in ſupport of a cauſe is not intitled to be credited, the diſcredit attaches to the cauſe, and extends to other witneſſes apparently unexceptionable. This kind of objection is, I think, ſometimes applied too generally, and without uſing that caution and diſcrimination which the principle of it eſſentially requires. In caſe the impeachment of the veracity of a particular witneſs reſults from circumſtances that indicate management and fabrication in the cauſe itſelf; in caſe the perjury of the witneſs implies the ſubornation of the party; the whole ſyſtem may be regarded as tainted and corrupt, unleſs there are any, in other reſpects, ſuperior reaſons for believing the contrary; and the mere abſence of circumſtances of ſuſpicion, directly affecting the other witneſſes, will not deſtroy the preſumption of falſity that has attached itſelf to the cauſe. But if the imputation upon the particular witneſs is merely perſonal; if it reſults from conſiderations

(*a*) The following paſſage of the famous law, 3 ff. de teſtibus, is materially applicable to this ſubject. Teſtium fides diligenter examinanda eſt. Ideoque in perſona eorum exploranda erunt inprimis conditio cujuſque; utrum quis decurio, an plebeius ſit, & an honeſtæ & inculpatæ vitæ, an vero notatus quis, & reprehenſibilis; an locuples vel egens ſit, ut lucri cauſa quid facile admittat: vel an inimicus ei ſit, adverſus quem teſtimonium fert, vel amicus ei ſit pro quo teſtimonium dat. Nam ſi careat ſuſpicione teſtimonium, vel propter perſonam, a quâ fertur, quod honeſta ſit, vel propter cauſam, quod neque lucri, neque gratiæ, neque inimicitiæ cauſa ſit, admittendum eſt. § 2. Ideoque. *D. Hadrianus* Vivio Varo Legato provinciæ Ciciliæ reſcripſit, eum qui judicat, magis poſſe ſcire quanta fides habenda ſit teſtibus. Verba epiſtolæ hæc ſunt. "Tu magis ſcire potes, quanta fides habenda ſit teſtibus: qui & cujus dignitatis & cujus æſtimationis ſint: & qui ſimpliciter viſi ſint dicere, utrum unum eundemque meditatum ſermonem attulerint; an ad ea quæ interrogaveras extempore veriſimilia reſponderint."

foreign to the immediate cauſe; if it is founded upon ſome collateral motive of his own, and no ſuſpicion of ſubornation can be fairly entertained; the cauſe, in other reſpects, ſhould be at liberty to ſtand or fall upon its general merits, without being affected by the peculiar objection; in the ſame manner as a ſeries of reaſoning, in itſelf perfect and complete, is not affected by the collateral addition of an untenable argument.

The conflict of oppoſite witneſſes is the grand ſource of forenſic altercation. In adverting to the circumſtances which influence the credit of witneſſes individually or collectively, I have neceſſarily had occaſion to mention their oppoſition. Without going through the particulars again, it will be ſufficient generally to obſerve, that whatever principles of reaſoning are correct and proper, when examining the veracity or accuracy of an individual witneſs or a number of witneſſes uncontradicted, become more peculiarly important in determining the balance of credit, with reſpect to veracity, or the ſuperior degree of accuracy, upon matters of judgment and obſervation, in caſes of conflict and oppoſition. The general ground of credit, founded upon the preſumption that a witneſs ſpeaks with truth and accuracy is deſtroyed, when the reſpective aſſertions are in oppoſition to each other, and therefore cannot both be true. Whatever therefore may eſtabliſh or diminiſh the confidence in a witneſs, whoſe teſtimony is uncontradicted, will determine the preference in caſes of oppoſition; but the reſpective grounds of aſſent or diſcredit are ſometimes ſo equally balanced, that the mind cannot, with ſatisfaction, pronounce a judgment between them; and all that can be recommended is a calm, patient, and anxious inveſtigation. Where the poſſibility of miſtake on the one ſide is contraſted with the imputation of perjury on the other, and there are no collateral circumſtances to fix the determination, there can be no doubt but that a caſual error is to be deemed more probable than a wilful miſrepreſentation. When the judgment, after every exertion, is reduced to the neceſſity of deciding, that on the one ſide or the other, there has been an intentional falſehood, and no ſatisfactory reaſons occur for fixing the ſuperiority of credit; the laſt reſource is to obliterate wholly the conflicting teſtimony, and to determine upon the want of a preponderance in proof, according to the rules which muſt have prevailed in the total abſence of it. The reſult of an inveſtigation of evidence will, after the moſt enlightened and painful reſearch, be in many caſes, unfortunately at variance with the actual truth, but in proportion to the dangers of error inherent in the very frame and nature of the ſubject, ſhould be the care and anxiety

anxiety exerciſed in the avoidance of ſuch error as may proceed from an exceſs of confidence on the one hand or of caution on the other; and although that care and anxiety will often fail in their particular application, the perfection of human precaution will be attained, if they are ſo conducted that, according to the principles of reaſon and experience, they may be expected in general to ſucceed.

To the above obſervations, in which I have endeavoured to ſketch ſome of the principles that may not be undeſerving attention, in forming a judgment upon the accuracy and veracity of evidence, and which are deduced from the nature of the ſubject itſelf, it remains to ſubjoin a few others, originally founded upon the ſame principles, but more immediately connected with poſitive rules of practical authority. In the examination of witneſſes, a diſtinction is made with reſpect to the party by whom they are called, it being, in general, inadmiſſible for a party to put what are termed leading queſtions to the witneſſes adduced by himſelf, although ſuch queſtions are perfectly allowable upon a croſs-examination. It is ſometimes laid down that leading queſtions are thoſe which are to be anſwered by a mere affirmative or negative, and in which conſequently the anſwer is fully ſuggeſted by the queſtion. I think however that this deſcription, and the objection founded upon it, are ſometimes applied more extenſively than the principle upon which they are founded requires; the good ſenſe of the rule is perfectly manifeſt, with reſpect to all caſes where the queſtion propounded involves an anſwer immediately bearing upon the merits of the cauſe, and indicating to the witneſs a repreſentation which will beſt accord with the intereſts of the party; but where the queſtions are merely introductory, where the mere anſwer of yes, or no, will leave the point of the caſe preciſely as it found it, and can only be material as laying the foundation for a further inquiry; the reaſon of the objection does not occur, and the objection itſelf appears to be ill-founded; and the making it can only proceed from a captious and petulant diſpoſition to interrupt the courſe of examination. If a witneſs is aſked generally with reference to a particular occaſion, whether a perſon ſaid any thing, the anſwer *yes* or *no*, cannot very materially advance the intereſt of the party; and can only ſerve as the foundation for the more general queſtion, of what it was that was ſaid. But I have very frequently known this preliminary queſtion excite a clamorous interpoſition for correcting the ſuppoſed impropriety, by telling the advocate that his queſtion ſhould be, What did the perſon ſay? A queſtion which neceſſarily ſuppoſes the exiſtence of the general fact of ſomething having

having been ſaid, which poſſibly may not be the fact. I think that, according to the principles of good ſenſe and fair reaſoning, the reſtriction ought not to be extended to caſes, to which the occaſion of it cannot be deemed to apply; and that if the objection does not prompt an anſwer bearing upon the ſubject in diſpute, if the negative or affirmative anſwer will be perfectly indifferent, except as ſerving for a foundation of further inquiry; the Court would beſt conſult the ends of juſtice, by diſcouraging a conduct that can have no other effect than a frivolous altercation, diſtracting the attention of the advocate on the one ſide, and giving the other an opportunity of ſhewing off his talents for interruption; and exhibiting a pertneſs which may impreſs the byeſtanders with an idea of ſpirit and ingenuity.

It is ſaid, that if a witneſs depoſes falſely in any part of his teſtimony, the whole of it is to be rejected; and this is certainly correct ſo far as the falſehood ſuppoſes the guilt of perjury; the ground of credit being there deſtroyed; but if nothing can be imputed to the witneſs but error, inaccuracy, or embarraſſment; if there does not appear to be a real intention to deceive or miſrepreſent; neither the objection nor the reaſon for it applies. The argument is ſometimes urged with conſiderable vehemence, that a party who relies upon the teſtimony of a witneſs, muſt take it altogether, and cannot rely upon the one part and reject the other; whereas there is no inconſiſtency in aſſerting the general veracity of a narrative, and contending for the inaccuracy of ſome of its incidental particulars; much leſs is a party to be driven from his reliance upon the matters of fact releated by a witneſs, becauſe he contends that the witneſs is ill founded in his reaſonings and inferences deduced from them, as I have endeavoured to illuſtrate in a preceding part of the preſent ſection.

It is a general rule that a party cannot call witneſſes to the diſcredit of others, whom he has before examined; but if a witneſs proves facts in a cauſe which make againſt the party who calls him, that party, as well as the other, may call other witneſſes to contradict him as to thoſe facts; for ſuch facts are evidence in the cauſe, and the other witneſſes are not called directly to diſcredit the firſt; but the impeachment of his credit is incidental and conſequential only. *Bull.* 297. *Peake*, 126. I think it probable that an exception would be allowed to the rule of excluſion above mentioned, in the caſe of inſtrumented witneſſes denying their atteſtation; for as theſe are witneſſes whom it is neceſſarily incumbent on the party to produce, and the nature of their teſtimony is attended with ſuſpicion, the diſcredit of their characters is a ſtrong corroboration

roboration of the evidence, which it is competent to give from other ſources, of the authenticity of the inſtrument.

An exception to the reſtriction above mentioned, againſt putting leading queſtions, is allowed in the caſe of the witneſs's appearing to be unwilling to depoſe the truth in favour of the party by whom they are adduced. This unwillingneſs is commonly to be decided by the judge, according to his impreſſion of the demeanour of the witneſs, upon the trial. The ſituation of the witneſs, and the inducements which he may have for withholding a fair account, are alſo very proper circumſtances to be taken into conſideration in forming this deciſion. A ſon will not be very forward in ſtating the miſconduct of his father, of which he has been the only witneſs; a ſervant will not, in an action againſt his maſter, be very ready to acknowledge the negligence committed by himſelf. I conceive that the principle which requires a party to abide by the whole of what his own witneſs has ſworn, or wholly to abandon it, is alſo, in this caſe, ſubject to an exception; for there certainly is no teſtimony the veracity of which is leſs ſuſpicious, than the admiſſion extorted from an unwilling witneſs; and it would materially prejudice the intereſts of juſtice, if a witneſs of this deſcription could place the party producing him in the dilemma of either abandoning the benefit of the truth which has been with difficulty obtained, or of adopting all the falſehood which the witneſs may have the iniquity to mix up with it. The proper courſe ſeems to be to regard the evidence of an unwilling witneſs in the ſame light as that of a witneſs adduced by the adverſe party, reſpecting which it is a ſettled principle, that you may believe what makes againſt his point who ſwears, without believing what makes for it. *Bermon* v. *Woodbridge*, *Doug.* 781.

The croſs-examination of witneſſes adduced by the oppoſite party is a ſubject of the utmoſt nicety, with reſpect both to the conduct of the advocate, and the diſcrimination of thoſe who are to form a judgment; and it is in this part of the cauſe that moſt of the obſervations already ſuggeſted principally ariſe. The original examination of the witneſs, (except in the caſe of his giving an unwilling teſtimony,) ſeldom gives much room for obſervation; the ſtatement is for the moſt part ſufficiently explicit and direct. Sometimes that intereſt which he may feel in the event will be apparent, and thus aſſiſt the effect of the croſs-examination; ſometimes a real careleſſneſs and indifference upon the ſubject will produce an indolence of deportment; and a want of exertion for the recollection of material occurences injurious to the party adducing him, in the ſame manner as it has the effect of preventing a full and adequate

quate repreſentation of his caſe; but wherever this occurs there is very little ground to expect that his croſs-examination will lead to any concluſions unfavourable to the veracity of his ſtatement. This indifference is not unfrequently aſſumed; whenever that is the caſe, it ſeldom fails to be detected and expoſed in the courſe of a judicious croſs-examination. If there is no apprehenſion that a witneſs has any other diſpoſition than to give a plain and ſuccinct declaration of the truth, nor any wiſh in the advocate to convey a different impreſſion; but his croſs-examination is merely for the purpoſe of explanation, or for aſcertaining further facts of which he may be ſuppoſed to have a knowledge, it is not to be materially diſtinguiſhed from his examination in chief. The peculiar character of croſs-examination only attaches when it is ſuſpected that the witneſs is guilty of a perjury, or at leaſt miſrepreſentation or ſuppreſſion of facts, or when it is wiſhed to convey that impreſſion to the jury; and it is a matter of daily experience that this purpoſe is effected by an able and judicious croſs-examination, in many caſes where the purpoſes of juſtice would be eluded upon any different mode of inquiry. The abuſes to which this procedure is liable are the ſubject of very frequent complaint, but it would be abſolutely impoſſible, by any general rules, to apply a preventative to theſe abuſes, without deſtroying the liberty upon which the benefits above adverted to eſſentially depend: and all that can be effected by the interpoſition of the Court, is a diſcouragement of any virulence towards the witneſſes which is not juſtified by the nature of the cauſe, and a ſedulous attention to remove from the minds of the jury the impreſſions which are rather to be imputed to the vehemence of the advocate, than to the prevarication of the witneſs. Whatever can elicit the actual diſpoſitions of the witneſs with reſpect to the event, whatever can detect the operation of a concerted plan of teſtimony, or bring into light the incidental facts and circumſtances that the witneſs may be ſuppoſed to have repreſſed; in ſhort, whatever may be expected fairly to promote the real manifeſtation of the merits of the cauſe, is not only juſtifiable but meritorious; but I conceive that a client has no right to expect from his counſel an endeavour to aſſiſt his cauſe, or what is a more frequent object, to gratify his paſſions by unmerited abuſe; by embarraſſing or intimidating witneſſes, of whoſe veracity he has no real ſuſpicion, or by conveying an impreſſion of diſcredit which he does not actually feel; and that where ſuch expectations are intimated, there is an imperious duty upon the advocate, who, while the protector of private right, is alſo the miniſter of public juſtice, which requires them to be repelled. Conſidering the ſubject merely

as a matter of diſcretion, the adoption of an unfair conduct in croſs-examination has often an effect repugnant to the intereſts which it profeſſes to promote. In the caſe of *Hunter* v. *Kehoe*, before the Court of King's Bench in *Ireland*, *Mic.* 1794. *Ridgeway*, &c. 350, Lord *Clonmell* obſerved that croſs-examination had gone to an unreaſonable length, but he had in general permitted gentlemen to go as far as they pleaſed, becauſe if there was an honeſt caſe on the other ſide it would do them no good. But however unfavourable an injudicious aſperity of croſs-examination may be to the advancement of the cauſe, it, for the moſt part, is congenial to the wiſhes of the party, the neglect of it is regarded as an indifference to his intereſt and a dereliction of duty; and the practice of it is one of the ſureſt harbingers of profeſſional ſucceſs.

The benefits of croſs-examination are ſometimes defeated by the interpoſition of the Court, to require an explanation of the motive and object of the queſtions propoſed, or to pronounce a judgment upon them immediately: whereas experience frequently ſhews that it is only by an indirect, and apparently irrelevant inquiry, that a witneſs can be brought to divulge the truth which he had prepared himſelf to conceal; the explanation of the motives and tendency of the queſtion furniſhes the witneſs with a caution that may wholly defeat the object of it, which might have been ſucceſsfully attained, if the gradual progreſs, from immateriality to materiality, was withheld from his obſervation. The importance of an inquiry may ſometimes be ſtrongly felt by an advocate, and upon very reaſonable grounds, from his own inſtructions with reſpect to the bearing and circumſtances of the cauſe, which the judge, acting only upon the impreſſions of what has already been diſcloſed, cannot by any poſſibility anticipate. The full expoſition of the motives can only be attained by a premature expoſition of the caſe that is to be brought forward, and even when that can be done without prejudice to the party, the endeavour to ſatisfy the Court would have the common effect of an interruption of the regular courſe of inquiry, and inſtead of aſſiſting the accurate diſcuſſion of the queſtion, would, in all probability, terminate in confuſed and deſultory altercation.

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SECTION X.

Of Cases in which two Witnesses are necessary.

The necessity of proving a case by two witnesses must, like many of the other cautions which have been introduced into the law of evidence, very frequently occasion a failure of justice; and as a general principle, independent of all considerations of a judicial nature, there can be no doubt but that the mind will give a full assent to the declaration of a single individual of an unimpeached character, having no influence which can come in conflict with his disposition to veracity, speaking of facts which he had an adequate opportunity to observe, and which contain in themselves no internal violation of probability. Where any of these qualities are wanting to the testimony, it will of course be examined with greater circumspection; and the caution applied in its reception will increase in proportion to its departure from the combination of circumstances which produce an implicit reliance upon its truth, and to the nature of the consequences which may result from the error of too implicit an assent, giving due consideration to the effects of the opposite error of too suspicious a distrust. Where the testimony is in support of the imputation of guilt, it will be weighed with greater scruple, than when it tends to the manifestation of innocence. The assent to the testimony will also be regulated by the opportunity which the nature of the subject affords, of further elucidation, for where any circumstances, connected with the nature and object of the evidence, are calculated to induce suspicion, and the fact asserted must, if true, be susceptible of confirmation, the mere omission to give it the support that may be reasonably expected is an additional reason for its discredit. But the reasons which operate to produce a dissatisfaction with testimony, as being inadequate and inconclusive upon an examination of its nature and tendency, are very insufficient to warrant its rejection upon the ground of a general preliminary objection; which is as unreasonable, as to refuse the assistance of the strongest light which can be artifically procured, under circumstances that render it impossible to procure the assistance of the light of day.

It is an observation of *Lofft* in a note to *Gilbert*, after citing the opinions of *Beccaria* in favour of requiring two witnesses, and of *Blackstone* against it, that those laws, which condemn to death on the deposition of a single witness, are fatal to liberty. In right reason there should be two, because a witness who affirms, and the accused who denies, make an equal balance, and a third must incline the scale. It might perhaps be said with greater justice, that the

the abſolute and indiſcriminate excluſion of a ſingle witneſs in every capital caſe, would if not fatal, at leaſt be dangerous to ſecurity; as the opportunity of a ſolitary ſituation would enable a miſcreant to perpetrate a robbery, or a rape with impunity, however reſpectable the character of the perſon who ſuffered the violence, and however aſſured by previous knowledge of the identity of the offender. The ſuppoſed equality between the denial of the accuſed and the teſtimony of the witneſs is merely fanciful, unleſs it can be aſſerted, that there is an equal inducement to make a falſe accuſation, for the purpoſe of deſtroying an individual, with whom there was no previous animoſity, and to deny the commiſſion of a crime, for which a party is juſtly liable to undergo puniſhment, between (as I have ſeen it obſerved in a publication of Mr. *Chriſtian*) a perſon who by his falſehood has every thing to loſe and nothing to gain, and one who has every thing to gain and nothing to loſe.

The general rule of the *Roman* law which rejects the proof by a ſingle witneſs as inſufficient, is followed in the *Engliſh* courts which adopt that law, as the baſis of their proceedings; but it is ſaid, by Sir *William Blackſtone*, that to extricate itſelf out of the abſurdity of univerſally requiring two witneſſes, the modern practice of the civil law courts has plunged itſelf into another, for as they do not allow a leſs number than two witneſſes to be *plena probatio*, they call the teſtimony of one, though never ſo clear and poſitive, *ſemiplena probatio* only, on which no ſentence can be founded. To make up therefore the neceſſary complement of witneſſes, when they have only one to any ſingle fact, they admit the party himſelf (plaintiff or defendant) to be examined in his own behalf; and adminiſter to him what is called the ſuppletory oath; and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device, ſatisfying at once the forms of the *Roman* law, and acknowledging the ſuperior reaſonableneſs of the law of *England*; which permits one witneſs to be ſufficient where no more can be had, and to avoid all temptation of perjury, lays it down as an invariable rule that, *nemo teſtis debet eſſe in propria cauſâ*. I am not at preſent enabled to aſcertain the accuracy of the learned commentator's ſtatement reſpecting the practice of the *Engliſh* courts of civil law, but if the party can inſiſt, *de jure*, upon his own oath being received as a ſufficient confirmation of the teſtimony of a ſingle witneſs, the application of the ſuppletory oath is conſiderably varied from its original inſtitution, according to which it could only be adminiſtered at the diſcretion of the judge.

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The ſemiproofs mentioned by *Pothier*, and which will admit of confirmation by the oath of the party, are written documents, ſuch as the books of tradeſmen. I conceive that there are no paſſages in the text of the civil law, which warrant the judge in deciding upon the teſtimony of a ſingle witneſs confirmed by the ſuppletory oath. *Pothier*, No. 833. obſerves, that the doctors mention the depoſition of a ſingle witneſs who is a perſon of credit, as a proof which may be completed by the oath of the plaintiff; but refers to the paſſage to which this Section is an Appendix, as ſhewing that by the law of *France* this is only allowed in matters of very ſlight importance; ſuch as treſpaſſes where the damage does not exceed 20 ſols by day, or 40 ſols by night. *Maſcardus* in ſupport of the poſition, that the oath of one witneſs is a ſemiproof, which, with the addition of the ſuppletory oath, will be ſufficient, refers to *L. Theopompus*, 14. *de dote prælegat. L. Jusjurand.* 9 *Cod. de Teſt.* and law 1. *ad fin. ff. Teſtamento quemadmodum aperiantur*. The firſt of theſe laws relates to the caſe where a teſtator directed that *Polianus*, who knew his intention, ſhould provide for the portion to be given to his daughter; and *Polianus*, upon being called upon by the daughter's huſband, depoſed that it was the father's intention, that ſhe ſhould have an equal portion with her elder ſiſter, which was decreed accordingly; but the law has no reference whatever to the ſuppletory oath, and in this caſe *Polianus* was not an accidental witneſs, but a perſon whoſe knowledge of a fact formed an eſſential ingredient in the cauſe. The law 9. *Cod.* directs that witneſſes, previous to their depoſition, ſhall be bound by the ſanction of an oath, and that credit ſhould be given in preference to the witneſſes of greater reſpectability. It adds, that the emperor (*Conſtantine*,) had formerly ordained no judge ſhould, in any cauſe, eaſily ſuffer the teſtimony of a ſingle witneſs to be admitted, and that he now forbids the anſwer of a ſingle witneſs being at all received, even where he is a perſon of the higheſt credit. *Juris-jurandi religione teſtes, priuſquam perhibeant teſtimonium jamdudum arctari præcepimus; et ut honeſtioribus potius teſtibus fides adhibeatur*, § 1. *Simili modo ſanximus, ut unius teſtimonium nemo judicum in quacunque cauſa facile patiatur admitti. Et nunc manifeſte ſancimus ut unius omnino teſtis reſponſio non audiatur, etiamſi præclare curiæ honore præfulgeat.* The operation of this law is evidently a direct excluſion of the teſtimony of a ſingle witneſs; and very little can be inferred from the recital of the former prohibition, againſt eaſily receiving ſuch teſtimony in favour of the poſition, that it was in general previouſly allowed, accompanied by the ſanction of the ſuppletory oath. I am at a loſs to conjecture upon what foundation

tion the reference is made to the title *Quemadmodum teſtamenta aperiantur*, for there is not either in the digeſt or code, any paſſage under that title which has the ſlighteſt relation to the ſubject, and it is not probable that any direct authority would have eſcaped the laborious induſtry of *Maſcardus*. But whatever the true concluſion upon this point may be, it muſt always be remembered that it was a diſtinguiſhing character of the ſuppletory oath, that it was in the diſcretion of the judge not only whether it ſhould be adminiſtered at all, but alſo to which of the parties it ſhould be adminiſtered; and that, ſuppoſing the teſtimony of a ſingle witneſs to be a ſufficient ſemiproof, the judge, inſtead of admitting the party producing the witneſs to depoſe that his teſtimony was true, might put it to the oppoſite party to ſwear that it was falſe.

I have felt a diſappointment in not receiving information, upon the modern practice upon this ſubject, from the lectures of Dr. *Brown*.

The common law courts in the exerciſe of their prohibitory juriſdiction, (which in ſome caſes appears formerly to have been carried beyond its legitimate limits,) have interfered to controul the civil law courts, in the exerciſe of their regular practice of requiring a proof by two witneſſes. A more correct principle ſeems to have prevailed in *Roberts*'s caſe, *Cro. Jac.* 269. 12 *Co.* 65. where upon a ſuit for ſubtraction of tithes a prohibition was applied for, becauſe there was only one witneſs to prove the leaſe, but was not allowed, becauſe it is a rule, that where the cognizance of the principal is, the cognizance of the acceſſary neceſſarily follows, and that when the original cauſe belongs to the ſpiritual court, though matter triable at the common law ariſeth, depending on the original cauſe, yet it ſhall be determined by that court, and the ſurmiſe that a party has but one witneſs is not a ſufficient cauſe for a prohibition, where the eccleſiaſtical court hath juriſdiction of the principal.

But in the ſubſequent caſe of *Richardſon* v. *Deſborough*, 1 *Ventr.* 291. the ſpiritual court having refuſed the proof of *plene adminiſtravit* by one witneſs, a prohibition was granted, for that where the matter to be proved (which falls in incidentally in a cauſe before them in the ſpiritual court) is temporal, they ought not to refuſe ſuch proof as the common law allows. In *Shotter* v. *Friend*, 2 *Salk.* 547. a prohibition was granted to the ſpiritual court, becauſe they would not allow the proof of a payment of a legacy by one witneſs, and the court ſaid, they may follow their own rules in things which are originally in their cognizance, but if any collateral matter doth ariſe, as concerning the payment of a legacy, if proof be

by one witneſs, they ought to allow it. The ſame principles were laid down incidentally in the caſe of *Breedon* v. *Gill*, 1 Lord *Raym.* 221. in which it was ſaid, that if the ſpiritual court require more than one witneſs to prove the revocation of a nuncupative will, the King's Bench will not intermeddle, but if in a ſuit for a legacy payment or a releaſe be pleaded, if they do not admit of proof by one witneſs, the King's Bench grants a prohibition.

It is ſo much the faſhion in all matters of controverſy, between the courts of common law and thoſe following the practice of the civil law, to imagine that the former who have certainly the power have alſo the right on their ſide, that the expreſſion of a doubt reſpecting the propriety with which the controuling power has been exerciſed, if it has the honour of being noticed at all, will moſt probably be noticed with diſapprobation; but it ſhould always be recollected that the power and courſe of procedure of the ſpiritual court, with reſpect to the objects of its juriſdiction, are as much a part of the law of *England* as the authority and practice of any other tribunal whatſoever, and every part of the law of the land is equally ſacred. Whatever may be the wiſdom of the practice which requires in general a proof by two witneſſes; it is, with reſpect to theſe courts, an eſtabliſhed part of their conſtitution, and therefore an eſtabliſhed part of the conſtitution of the kingdom, and when there is a conflict between the practice of the reſpective courts, with regard to the proof of facts upon which they have, whether originally or incidentally, a concurrent juriſdiction, it is not to be taken for granted that the courſe of the one is improper and illegal, becauſe it happens to differ from that of the other. Similarity of proceeding is, generally ſpeaking, a deſirable, but is often a ſubordinate object; and when ſuch ſimilarity is required, it ought to be conſidered whether it can be carried through in all its leading features, before it is required to be applied to any one of them; for otherwiſe the partial ſimilitude may only increaſe the effect of the general want of reſemblance. It is an eſſential part of the common law of evidence, not merely that the teſtimony of one witneſs ſhall be received, but that the witneſs ſhall be examined *viva voce* in open court, with all thoſe opportunities of ſifting the truth and accuracy of his narrative, which are incident to a public croſs-examination; whereas the examination in the ſpiritual court is in private, and upon prepared interrogations where the advocate is wholly incapable of trying the credit of witneſſes, by queſtions ſuggeſted from his demeanour and courſe of narrative upon his original examination; the evidence can only be encountered by queſtions prepared by anticipation, upon a view of the allegations reſpecting which the witneſs is to depoſe, but the neceſ-

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ſity for a concurrence of two witneſſes, may in ſome degree counteract the diſadvantage of not having an adequate opportunity to ſcrutinize, in the moſt effectual manner, the teſtimony of each witneſs individually. In the common law courts the deciſion is by a jury, who were originally required to come from the neighbourhood; and who were ſuppoſed to have a knowledge of the parties and the witneſſes, and of the credit due to them, and in ſome degree alſo (however juſtly the principle of the ſuppoſition may be diſcountenanced in modern practice) a knowledge of the facts of the cauſe, whereas the judge of the ſpiritual court has nothing to guide his deciſion, but the dead letter written examinations, which are adduced before him: the conformity required from theſe courts, then, in the admiſſion of a ſingle witneſs, is very defective and imperfect, unleſs it can be alſo extended to the introduction of the jury and the *viva voce* examination. In the ſubjects, with reſpect to which the conformity is required, there appears to be an aſſumption of authority which the principle applied to them is inſufficient to ſupport; for although *plene adminiſtravit* is a queſtion which, according to the nature of the demand, may be cognizable by either court indifferently, legacies are the peculiar province of the ſpiritual court, in total excluſion of the courts of common law, and therefore the controul of the courts of common law, with reſpect to ſubjects wholly foreign to their own authority, upon the pretence that the cognizance of the courts to which they peculiarly belong, is only incidental, cannot upon any correct principles of reaſoning be reconciled to the doctrine which is profeſſedly entertained; and here it may be recollected, that the concurrent power exerciſed upon this ſubject even by the court of chancery, is of no great antiquity, and that the controuling power in ſome degree aſſumed by it is comparatively recent.

The courts of equity are not in general claſſed amongſt the courts of civil law, but with the ſame mode of examination they have adopted the ſame principle of requiring a diſputed fact to be proved by the oath of two witneſſes, ſubject to the power of referring the caſe to the courts of common law, to be tried in the ordinary form by *viva voce* examination before a jury; and in ſome late caſes, the adoption of the doctrines and principles of equity, in courts of common law, has been cenſured as founded upon an imperfect and therefore erroneous analogy; inaſmuch as the anſwer of a defendant can in equity only be contradicted by two witneſſes, whereas the demand at common law may be ſufficiently eſtabliſhed by the evidence of one. I am by no means diſpoſed to contend in favour of the incroachment by courts of common law, upon the province of courts of equity, and am fully aware of all the incon-

veniences of adopting the partial imitation of a proceeding, where the whole ſyſtem with which it is connected cannot, ſo far as relates to the particular ſubject, be equally embraced, but with reſpect to this particular objection, of a difference in the proof to be required, I do not feel the weight of the argument. If it can be aſcertained that the fact inquired after is properly and without incroachment the object of any given juriſdiction, the mode of aſcertaining that fact may be properly left to the eſtabliſhed conſtitution of the juriſdiction itſelf, and the defects and diſadvantages on the one ſide may be counterbalanced by the ſuperiority in another: thus, to revert to the diſtinction mentioned with reſpect to the preceding ſubject, the diſadvantage (ſuppoſing it to be one) of admitting a proof by one witneſs, may be counterbalanced by the advantage of a *viva voce* examination and the aſſiſtance of a jury.

The general rule that a decree ſhall not be made againſt the anſwer of the defendant upon the oath of one witneſs, is fully eſtabliſhed by a ſeries of caſes, from 3 *Ch. Ca.* 123. *Allam* v. *Jourdon*, 1 *Vern.* 161. to *Mortimer* v. *Orchard*, 2 *Veſ. Jun.* 243. But this rule is only applied where the anſwer contains a full and poſitive denial; for where a defendant only denied notice to herſelf, and it was proved by a ſingle witneſs that notice had been given to a perſon, who in the opinion of the court was fully proved to be her agent, this was held ſufficient. Lord *Hardwicke* ſaid, that the rule which had been ſtated was generally true, but that it admits of this diſtinction, where the defendant's anſwer is a clear denial of a fact, which is proved only by one witneſs, the court will not decree againſt the anſwer. But where it is not a poſitive denial of the ſame fact, but admits of a difference that it is only a denial with reſpect to herſelf, whereas in other reſpects it will equally affect her, there are ſeveral caſes where the court on one undoubted witneſs will decree againſt that anſwer: then here ſhe denies only perſonal notice which is a negative pregnant, that ſtill there may be notice to her agent, and is a fact equally material. *Le Neve* v. *Le Neve*, 1 *Veſ.* 64. 3 *Atk.* 646.

In *Arnot* v. *Biſcoe*, 1 *Veſ.* 95. the ſame illuſtrious perſon ſaid, if the ſingle evidence is denied by the anſwer, there is not ſufficient to decree upon, and the bill muſt be diſmiſſed; but the anſwer is not *ad diem*, the charge being poſitive, and the anſwer only to belief, which is not ſufficient to contradict what is poſitively ſworn, nor could the defendant be convicted of perjury thereon, but there being ſome doubt on the evidence, his Lordſhip directed an iſſue.

In *Reech* v. *Kennegal*, 1 *Veſ.* 123. Lord *Hardwicke* ſaid, the anſwer muſt be a poſitive denial and reſt ſingly thereon. In theſe

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two laſt caſes, as in many other inſtances in *Veſey's Reports*, there is no diſtinct ſtatement of the circumſtances upon which the opinions were founded. In a prior caſe of *Hine* v. *Dodd*, 2 *Atk.* 275. his Lordſhip ſeems to have rather deviated from the principle juſt referred to, for a witneſs ſwore poſitively to the defendant having acknowledged notice of a prior deed not regiſtered, and Lord *Hardwicke* ſaid, "Undoubtedly this is material evidence, but then it is only one witneſs againſt the anſwer of the defendant; it is true his anſwer is very looſe, by referring from one anſwer to another; but in the laſt he ſwears *to his belief*, that he did not know of the fact." But a principal ground of deciſion was, that the regiſter act of deeds in *Middleſex*, gives priority to the inſtrument firſt regiſtered, and although courts of equity give relief in caſes of notice, his Lordſhip ſeemed to think that ſomething more than this evidence of the defendant's confeſſion againſt his anſwer as to his belief, was neceſſary to take the caſe of the act. This caſe, therefore, cannot be properly conſidered as laying down any rule in oppoſition to the doctrine before adverted to.

In *Walton* v. *Hobbs*, 3 *Atk.* 19. *Janſon* v. *Rany*, *id.* 140. Lord *Hardwicke* held that the rule did not apply, as the evidence produced by the plaintiff was ſupported and corroborated by a great many concurring circumſtances, but no explanation is given in either of the caſes with reſpect to what thoſe circumſtances were, or how they appeared to the court, whether from the internal probability of the caſe itſelf, the admiſſions in the anſwer, or the teſtimony of witneſſes. It does not ſeem, in any of the equity caſes, to have been the ſubject of diſcuſſion whether the proof by different witneſſes of different facts, leading to one concluſion, is to be regarded as a ſufficient compliance with the rule, which requires two witneſſes in oppoſition to the defendant's anſwer.

In *Pember* v. *Mathers*, 1 *Bro. Ch.* 52. the bill was filed by the original leſſees of a term, againſt their aſſignee for the ſpecific performance of an agreement, to execute a bond of indemnity againſt the covenants of the original leaſe; this agreement was denied by the anſwer and proved by one witneſs; and Lord *Thurlow* at firſt expreſſed his opinion that the plaintiff ought to have a decree, upon the principle that the rule was ſubject to the modification, that if there are circumſtances ſufficient to turn the ſcale, it ought to be turned, the oath of the bye-ſtander with circumſtances corroborating it, being better than that of an intereſted perſon; but upon a ſuggeſtion from the defendant's counſel, that a particular perſon was preſent at the tranſaction beſides the witneſs who had been examined, he directed an iſſue. The only confirmatory circumſtance in that caſe was, that ariſing from the nature of the

contract itſelf, according to which the vendor would expect to have no more connection with the original leſſor. The Lord Chancellor ſtated the general rule to be, that where the defendant in expreſs terms negatives the allegations of the bill, the court will neither make a decree, nor ſend it to a trial at law.

In *Ibbotſon* v. *Rhodes*, 2 *Vern.* 554. 1 *Eq. Ab.* 229. the Lord Keeper in directing an iſſue, where the anſwer denied a notice which was proved by one witneſs, directed that the plaintiff ſhould admit the defendant's anſwer to be read at the trial, not as evidence, for that could not be, neither ſhould they admit it to be true, but to be ſworn ſo that the defendant might have the benefit of his oath at law as in equity, if it would weigh any thing with the jury. In the caſe of Lord *Milton* v. *Edgeworth*, vi. *B. P. C. Old Edit.* v. 313. *N. Edit.* the Court of Exchequer in *Ireland* having directed an iſſue generally on a queſtion, whether there had been an agreement for reducing the intereſt on a mortgage from 8 to 6 *per cent.* which was proved by one witneſs on behalf of the defendant, with confirmatory circumſtances, the Houſe of Lords confirmed the direction, with the addition, that the appellant (the original defendant) ſhould be at liberty on the trial to read an anſwer in a former cauſe, by the perſon under whom the plaintiff claimed, in confirmation of the fact alleged. This caſe, according to the report of *Pember* v. *Mathers*, was referred to by Lord *Thurlow*, as confirmatory of a general practice, that where the court ſends a fact proved by one witneſs to a trial at law, it orders the anſwer to be read in evidence. But it is clear that the deciſion by no means warrants that inference; the witneſs was for the defendant in ſupport of his anſwer, and not for the plaintiff in oppoſition to it; the anſwer directed to be read, was that in a former cauſe, and made by a perſon under whom the plaintiff claimed, and would therefore manifeſtly be evidence *de jure*, and without any direction at all. As Lord *Thurlow* was counſel in the cauſe, and the early part of Mr. *Brown's Chancery Reports* is by no means diſtinguiſhed for correctneſs, it is much more probable that the error is imputable to the reporter than to the Lord Chancellor. In *Only* v. *Walker*, 3 *Atk.* 407. an agreement for a compoſition was proved by one witneſs, but as ſtated by the reporter, there was the circumſtance of the defendant's confeſſing the agreement proved in the cauſe, and ſome other circumſtances (not mentioned) to corroborate the proof of the ſingle witneſs. If the confeſſion alluded to was proved by another witneſs, and went to the extent of the agreement alleged, this was a full proof by two witneſſes; but the caſe was not ſo conſidered, and an agreement of a different kind was admitted in the anſwer. The Maſter of the Rolls offered

ed the defendant an iſſue, who declined it, unleſs he was allowed to read the anſwer, as was done in *Ibbetſon* v. *Rhodes*, and another caſe of *Cant* v. *Beauclerck*; but his Honour ſaid, that it did not reſt ſingly upon the oath of the witneſs, for ſeveral circumſtances corroborated what he ſwore, and therefore was not within the rule of thoſe caſes, and conſequently he could not give any directions that the anſwer of the defendant ſhould be read at law.

In a book called *Clerk's Inſtructor*, 9. it is ſaid, that a man and his wife are conſidered but as one witneſs; but books of this kind are no authority; and it is very improbable that ſuch an abſurdity would be admitted in modern practice.

In the ſame book, p. 6. it is laid down, that if a defendant in an anſwer affirm any thing, which he ſeconds by the teſtimony of a ſingle witneſs, and nothing is proved againſt it; this is ſufficient to decree for the defendant or to diſmiſs the bill. I apprehend that the rule is here correctly ſtated, for the ground of requiring two witneſſes againſt the anſwer, is the credit given to the defendant's oath, whereas there is nothing to oppoſe to the teſtimony of the witneſs for the defendant; if there is any objection, or ſuſpicion with reſpect to the actual teſtimony given, it is competent to the court in this as in all other caſes to direct an iſſue.

By ſtatutes 1 *Edw.* 6. *c.* 11. *f.* 12. 7 *Wm.* 3. *c.* 3. *f.* 24. it is provided that no perſon ſhall be indicted or convicted of high treaſon, except by the evidence of two witneſſes; the latter act imports, that one witneſs to one overt act, and another witneſs to another overt act of the ſame treaſon, ſhall be ſufficient. And the ſame rule was previously adopted in the conſtruction of the former act, but it is expreſsly provided by the laſt act, that if two treaſons of different kinds are alleged in the ſame indictment, one witneſs for each ſhall not be ſufficient. The proof by ſeparate witneſſes, of repeated attempts to kill the king, is the proof of different overt acts of the ſame treaſon, and not of different treaſons; and one witneſs of each attempt is therefore ſufficient: *Vid. Stafford*'s caſe, *Raym.* 408. It is alſo held, that if one witneſs proves an overt act of treaſon in the county where the indictment is laid, the proof by another witneſs of another overt act, in a different county, will maintain the charge. See 1 *Eaſt*, *P. C.* *c.* 2. *f.* 65. One witneſs alſo is ſufficient to prove a collateral fact, as where a priſoner called witneſſes to prove he was born in *France*, (which, under the circumſtances, would have been a ſufficient defence,) it was ruled that his being born in *Ireland* might be proved by a ſingle witneſs: *Foſter*, 240. I think Mr. *Eaſt* has clearly ſhewn, *P. C.* *c.* 2. § 66. that the acts of parliament are ſufficiently ſatisfied by two wit-

neſſes proving the confeſſion of the party charged. The ſtat. 1 and 2 *P.* and *M. c.* 10. provides, that treaſons reſpecting the coin may be proved as before the ſtat. of *Edw.* 6. and theſe treaſons are not included in the ſtatute of *William.* The ſtat. 40. *G.* 3. *c.* 93. contains alſo an exception with reſpect to the aſſaſſination of the king, or any direct attempt againſt his perſon, whereby his life may be endangered, or his perſon ſuffer bodily harm.

In caſe of perjury, it is required that the falſehood of what has been ſworn ſhall be proved by two witneſſes, as the oath of the party accuſed on the one ſide in the original ſwearing is conſidered as equivalent to the oath of one witneſs againſt him. Perhaps upon the principles of correct reaſoning, this conſideration may be rather calculated to ſhew that ſuch evidence ought to be received with conſiderable caution, than that it ought to be abſolutely rejected; and the motives for falſehood in the original teſtimony or depoſition, may be much ſtronger with reference to the event on the one ſide, than the motives for a falſe accuſation of perjury on the other. It is held that the rule does not apply where the teſtimony of the ſingle witneſs is ſupported by other circumſtances. I do not find any authority with reſpect to the nature of the circumſtances, which ſhall be deemed ſufficient for this purpoſe; the only fact that I recollect having ſeen acted upon as ſuch in practice, is the writing of the defendant.

Whatever principles are applicable to the ſufficiency of the proof given by two witneſſes in one caſe, are equally applicable in others, where there is the ſame neceſſity, except where the particular nature of the ſubject induces a difference. A caſe occurred (which I quote from memory) before Sir *William Scott*, in the Conſiſtory Court of *London* in *Eaſter Term*, 1792, upon a proceeding for diſturbing a clergyman in the exerciſe of his functions; and it was held that the proof of one act of interruption by one witneſs, and of another by another, was not ſufficient. The learned judge ſaid (*a*), the caſe had been compared to high treaſon at common law, and to proceedings for adultery and defamation in that court; but in caſe of high treaſon the guilt conſiſted in the intention of the mind, of which the facts proved were only indications, and the proof by different witneſſes of different acts, was all evidence of one criminal intent; and that in caſes of adultery and defamation, there was always a general article charging the fact of adultery or defamation, beſides the articles alleging

(*a*) I do not affect to ſtate any of his expreſſions, but merely attempt to delineate according to my recollection the ſubſtance of the argument.

particular

particular inſtances (*a*), and the ſeveral particular facts conſtituted parts of the ſame adulterous or defamatory conduct, whereas in the particular caſe, not only the proofs, but the charges to which they were applied, were ſeparate and diſtinct.

The following paſſage from *D'Agueſſeau*, in the caſe of the prince *de Conty*, in ſupport of the poſition that an allegation of inſanity may be ſupported by the teſtimony of different witneſſes, to different indications of it, may perhaps be deemed ſuperfluous with reſpect to the immediate propoſition, but my partiality for this illuſtrious magiſtrate, and this particular exerciſe of his judicial talent, preſents a temptation for adducing his authority, whenever an opportunity occurs, which I have not the inclination to reſiſt.

The queſtion either relates to a certain ſingle determinate fact, in which caſe it falls within the common maxim *unus teſtis nullus teſtis*, becauſe that fact being eſſential, it is abſolutely requiſite that the depoſitions of two witneſſes ſhould concur to eſtabliſh the truth of it.

Or, on the contrary, the queſtion is reſpecting a general fact, a habit, a multiplicity of actions leading to a ſingle conſequence; and then it would be both impoſſible to require two witneſſes for each particular act; and unjuſt to reject the ſingle depoſitions of ſeparate acts.

We ſay, in the firſt place, that it would be often impoſſible to require from a party, that each act ſhould be proved by two witneſſes. For inſanity, or ſanity, appear in all places, and at all times, and yet the ſame perſons cannot always be preſent at this multitude of actions. One obſerves one action, another another. But if it were abſolutely requiſite that they ſhould all ſee the ſame action, it muſt be ſuppoſed that the perſon whoſe ſtate is to be conteſted, is to be always ſurrounded by a crowd of witneſſes, the exact and aſſiduous obſervers of his conduct, who may at a future period relate the ſame circumſtances of ſanity or derangement.

But this ſuppoſition is not only abſurd and impoſſible, we add, that it would be unjuſt to reject the ſingle depoſitions of ſeparate acts.

The general fact is the only one, of which the proof is ordained; and you know that in this cauſe, although it was contended to be neceſſary to allege particular facts of inſanity, you paid no regard to this argument, but confirmed purely and ſimply the ſentence, which admitted a proof to be made of the general fact. Particular

(*a*) In the Eccleſiaſtical Court, the allegation is contained in a ſet of articles particularizing the tranſactions intended to be proved, and the examination of the witneſſes conſiſts in reading the articles, and taking their depoſitions with reſpect to the facts alleged. The firſt article is always general, ſtating the charge of adultery, &c. without any circumſtances or particulars; upon which general article no witneſſes can be examined.

facts

facts are infinite. How could they all be included in the articles of the allegation? The witneſſes are left at liberty to ſelect and ſtate them as proofs of the general fact; but this general fact is always the ſubject of the proof, and the principal object of juſtice. It is ſufficient if all the witneſſes ſay, that the perſon whoſe ſtate is conteſted, appeared to them to be ſane, or the contrary. It is not neceſſary that they ſhould all agree in the reaſons of their judgment, provided they concur and are unanimous with reſpect to the principal fact, and only differ in particular circumſtances. They come to the ſame point by different ways, and thoſe who were ſeparated in the means, are united in the end. It is the ſame, as if two experts concur in declaring a writing to be forged, but found their opinion upon different obſervations. If they were ſeparately examined, and concurred in their judgment, although their motives might be different, would not the proof be as ſtrong as any which the ſcience of experts can ſupply? In the ſame manner, witneſſes are examined with reſpect to a perſon's ſituation. One adduces one fact, another dwells upon another, all equally pronounce a concurrent judgment upon the ſtrength or weakneſs of his mind; can it be contended that the proof is not perfect, becauſe each circumſtance is not atteſted by two witneſſes? Do not we know that it occurs every day in queſtions of ſtate, eſpecially in thoſe which relate to filiation and legitimacy, that it is very rare to ſee two witneſſes who mention the ſame fact? One eſtabliſhes one preſumption, another furniſhes another conjecture, and it is the aſſemblage of all theſe preſumptions and conjectures which forms the proof. An infinity of atoms compoſe a body, and although each in particular ſeems to have no extenſion, they together form an extended ſubſtance. Many rays, which when ſeparate have no perceptible luſtre, by their union produce a glowing body of light, many particular facts form one general fact. So likewiſe let us add, that in theſe affairs the witneſſes in ſome degree participate in the functions of the judges, whoſe deciſion they ſometimes anticipate. Now as it is not neceſſary that the ſame facts ſhould determine all the judges, and ſome may be influenced by one fact, and others by another, yet they are all ſaid to be of the ſame opinion, when they all decide in favour of ſanity or of the want of it; in the ſame manner witneſſes are to be conſidered as unanimous, when from different facts they all draw the ſame concluſion, upon the ſame general fact which is the ſubject in diſpute.

The writers on juriſprudence, and eſpecially *Maſcardus*, after having ſtated a part of theſe reaſons, draw from them this general

conſequence: *Non tamen de neceſſitate requiritur quod ſint conteſtes, ſed ſatis erit ut ſaltem ſingulares ſint, quia et tam recte probabunt furorem.*

SECTION XI.

Of hearſay Evidence.

Mr. *Fonblanque*, in his notes to the *Treatiſe of Equity. B. 6. c. 1. ſ. 1.* ſpeaking of this ſubject, obſerves, that in conſidering the authority of general rules, it is material to diſtinguiſh thoſe which are drawn from the depths of reaſon, and the ſtrict obſervance of which is eſſential to the attainment of truth, from thoſe which are founded upon notions purely of convenience, and which may be conſidered as merely modal and aſſiſtant, rather than eſſential to ſuch object; ſuch are thoſe general rules which reſpect the order of proceeding, &c. After taking notice that his author has ſtated ſome general rules, with reference to the qualifications of witneſſes, he adds, that it may be material to ſtate, in addition to thoſe which reſpect the qualification of witneſſes, thoſe which reſpect the nature of their evidence, for though they are generally thrown together, he apprehends them to be in their nature extremely diſtinct. Thus when evidence is rejected as hearſay, it is rejected not on the ground of any want of qualification in the witneſs, but that the nature of his teſtimony, though it be true, does not afford the degree of proof which the fact may allow.

It is certain that privately ſpeaking a hearſay of certain facts may in many caſes convey to the mind as full a conviction, as the ocular obſervation of the facts themſelves. If a perſon of indiſputable veracity relates a palpable fact, as received from another of equal veracity, the hearer acts upon the ſuppoſition of the exiſtence of the fact, with the ſame aſſurance as if it had fallen under his own inſpection, but the degree and extent to which this conviction can be carried, is comparatively very ſmall, and the admitting it in the adminiſtration of juſtice, would be productive of very conſiderable error and inconvenience. It would import a full reliance upon the veracity, the accuracy, and the fullneſs of the information that had been communicated by every perſon through whom the information had been tranſmitted, and would want the ſanction of an oath which could not be applied to the occurrence itſelf, but only to the fact of the communication. It would alſo be ſubject to the perhaps ſtronger objection, of not admitting thoſe inquiries

inquiries which conduce to a full and ſatisfactory explanation of what is related.

Evidence of this deſcription is therefore in general excluded, and moſt of the caſes in which it is apparently admitted, when properly examined, will perhaps be found in principle not to amount to exceptions from the general rule; for it is to be recollected that all conſiderations of evidence muſt be purſued with reference to the ſubject matter to which it is applied, and that to weigh the competence or ſufficiency of evidence in any given caſe, it is requiſite to diſcern with accuracy the nature of the propoſition which it is offered to eſtabliſh. What is called hearſay, may be properly divided under two principal heads: 1ſt, Thoſe in which it is a mere narrative of an event: 2d, Thoſe in which it is the actual occurrence of a fact, which fact may be materially connected with the general concluſion intended to be drawn upon the ſubject of the enquiry. Speech is a mode of action; but as it is an action of much more frequent occurrence than any other, and as there are ſome reſpects in which it may be diſtinguiſhable from other actions, it is often referred to as a ſeparate ſubject, and the frequency of the ſeparation occaſions the affinity to be ſometimes overlooked; but I conceive that the diſtinction between the caſes, in which the immediate action of ſpeech furniſhes a material indication with reſpect to the object of inquiry, and thoſe in which it is a mere act of narration, will in moſt caſes furniſh the proper principle for aſcertaining whether the evidence of its occurrence is or is not properly admiſſible. Many acts are in themſelves of an equivocal nature, and the effect of them depends upon the intention or diſpoſition from which they proceed, which is in general beſt denoted by the expreſſions accompanying them. Whereever, therefore, the demeanour of a perſon at a given time becomes the object of enquiry, his expreſſions, as conſtituting a part of that demeanour, and as indicating his preſent intention and diſpoſition, cannot properly be rejected in evidence as irrelevant. In queſtions of fraud or *bona fides*, an adequate judgment can in general only be formed by having a perfect view of the whole tranſaction, which of courſe includes the converſation which forms a part of it; and, according to the phraſe uſually applied to this ſubject, the language which is uſed on any occaſion forms a part of the *res geſta*. In queſtions reſpecting acts of bankruptcy, the intention is almoſt always the very point in iſſue, and this is commonly to be collected from the converſations importing the exiſtence of thoſe apprehenſions which give a character and quality to the concomitant actions. In *Bateman* v. *Bailey*, 5 *T. R.* 512.

a perſon who had been carried from his own houſe to *Mancheſter*, under an arreſt, upon being liberated went to a retired public houſe, where he took pains to withdraw himſelf from obſervation. Evidence was offered of what he ſaid, upon his return home, as ſhewing that he had kept out of the highway for fear of another arreſt, which being rejected, the Court of King's Bench upon an application for a new trial, ruled it to be admiſſible; and it was ſaid by the court, that although the bankrupt cannot be called as a witneſs to prove his own bankruptcy, yet it was never doubted but that what was ſaid by him at the time in explanation of his own act, may be received in evidence. An admiſſion by him before his bankruptcy of a debt due to another, is ſufficient to charge his eſtate. If he has been abſent from his home, an admiſſion by him that he has been abroad to avoid his creditors is good evidence. Whatever he ſays, in ſhort, before his bankruptcy, is evidence explanatory of the act done by him. In this inſtance, he abſented himſelf from home under ſuſpicious circumſtances, for which his reaſons were aſked, and without doubt it was competent to inquire of the witneſs to whom he communicated them, what thoſe reaſons were.—So far as the obſervations in the preceding caſe are referable to the immediate point before the court, I think that they are perfectly correct, and in truth they are directly illuſtrative of the principle which I am endeavouring to eſtabliſh; but ſome of the expreſſions that have been cited, if conſtrued literally, may be applied with greater latitude than the principle ſeems fairly to warrant. The converſation of a perſon, upon his return home, naturally connects itſelf with the occaſion of his abſence, and is an indication of the exiſting ſtate of his mind; and wherever the expreſſions can be ſo connected with the actions, as to be regarded as the mere reſult and conſequence of the co-exiſting motives, they form a proper criterion for directing the judgment which is to be formed upon the whole conduct. But while it is an eſtabliſhed rule that the teſtimony of a bankrupt upon oath ſhall not be received to eſtabliſh the exiſtence of his own bankruptcy, it ſeems inconſiſtent to admit, as an indiſcriminate propoſition, that any thing which he may have previouſly ſaid ſhall be an admiſſible medium of evidence; and I think the proper conſideration will be beſt referred to the principles already adverted to, according to which, whatever expreſſions may fairly be regarded as reſulting from the cotemporary motives acting upon his mind, and influencing his conduct, will be properly received; but that a mere narrative at any time before the iſſuing of the commiſſion of a conduct, and the motives of that conduct at any indefinite antecedent period, ought not

not to have an authority which is denied to his ſolemn examination.

In caſe a queſtion ſhould ariſe reſpecting the ſtate of health of a perſon at a given period, the application of that perſon to a medical practitioner, and the repreſentation of his complaint, would be properly evidence of a fact, the repreſentation being the natural effect and conſequence of the exiſting indiſpoſition. According to the repreſentation in the public prints, of a caſe of *Aviſon* v. Lord *Kinnaird* (which will moſt probably not be included in a regular report before this diſcuſſion has paſſed the preſs), reſpecting an inſurance by the plaintiff on the life of his wife, evidence has been allowed by the Court of King's Bench, of the wife having repreſented at a ſubſequent period the ſtate of her health, at the time of effecting the inſurance. This upon principle I ſhould have conceived to be inadmiſſible, as amounting only to narration; the mere circumſtance that it could not be ſuppoſed that the party was actuated by any undue motive, would go a great way in favour of the general admiſſibility of hearſay evidence; the circumſtance that this was the confeſſion of the wife of the party affected by the evidence, does not ſeem to form a ſufficient exception, unleſs it can be contended, which it certainly cannot, that the wife's declarations are in general to be admitted againſt the huſband.

In caſes of conſpiracy, whether amounting to treaſon or not, the acts of any of the parties engaged in the confederacy, with reference to the common object, are admiſſible evidence againſt the others, whether immediately privy to them or not. See *Rex* v. *Stone*, 6 *T. R.* 527. and the caſes there cited; and I conceive that verbal acts, if I may be admitted to uſe that term, as indicating a preſent purpoſe and intention, cannot be diſtinguiſhed from others; but in this caſe as in others, where the expreſſions are merely narrative of a paſt occurrence, I do not think that they are properly admiſſible to prove ſuch occurrence having exiſtence.

In this view of the ſubject, there does not appear any ſubſtantial difference between the expreſſions of a third perſon, and thoſe of a party adducing them in his own favour; ſuppoſing the previous fact, that his conduct in other inſtances could properly be the ſubject of inquiry.

If an action was brought againſt a perſon, for knowingly giving another a falſe character of affluence, his fairneſs in doing ſo might be rendered apparent by his giving credit himſelf; his offering to become reſponſible to a different perſon, or his recommendation to his own neareſt connections, would alſo be a natural indication of

his

his ſincerity, and therefore, I conceive, would be alſo proper evidence of it; as in any other caſes, thoſe expreſſions which indicate an exiſting temper and diſpoſition would be a proper medium of proof, whenever the exiſtence of that temper and diſpoſition would be a proper object of inquiry.

It is ſometimes ſaid, that the objection to hearſay evidence, does not apply with reſpect to a declaration accompanied by an act; in the preceding obſervations I have endeavoured to trace the nature and import, and, therewith, the limits of this propoſition, which I think is only correct where the expreſſions are demonſtrative of the nature of the act itſelf, and that the mere circumſtance of being cotemporaneous by no means removes the principle of the objection. Thus where a man delivers a ſtolen watch to a conſtable, and ſays, that he has received it from the priſoner; what is related is a detached and ſeparate fact, and not a mere expoſition of the accompanying fact itſelf; and therefore is, I conceive, not properly admiſſible, although I have known an argument addreſſed to a court of Quarter Seſſions with confidence and ſucceſs, in ſupport of the oppoſite deciſion. In the ſame court, I have ſeen a deciſion (which, after the numerous citations that I have made of judgments which have appeared to me in oppoſition to the correct principles of legal reaſoning, with a view to illuſtrate my general obſervations, I am glad of the opportunity of adducing as an inſtance of concordance with my opinion), I have known evidence offered on behalf of the priſoner of the declaration which he made at the time of being apprehended, which was objected to, but received: theſe declarations correſponding with the evidence adduced by him, were a manifeſt indication that the defence had not been prepared at leiſure and by way of afterthought; they conſtituted a part of his demeanour, at a time when the demeanour is neceſſarily affected by the conſciouſneſs or guilt or innocence; and denoted a conſiſtency in his defence, which was a ſtrong corroboration of its veracity; the mere declaration ſtanding alone as an inſulated fact, would have been no proof of the truth of the aſſertion, but the evidence of it could not have been properly rejected, as the immateriality of it could not be aſſumed, if by the addition of other evidence it could naturally be rendered material.

If a perſon is employed as agent to another, the acts of the agent within the apparent limits of his employment are, in point of legal effect, the acts of the principal, and therefore, whatever is repreſented by the agent in the courſe of ſuch tranſaction, is properly evidence againſt his principal, not properly as a proof of the actual truth of the fact repreſented, but as conſtituting in itſelf a repreſentation by which the principal is bound, as if it had been made

made by himſelf, and which is equally obligatory upon him, whether the relation is true or falſe. In the caſe of *Biggs* v. *Lawrence*, 3 *T. R.* 454. the defendant directed goods to be delivered to *Wood*, the captain of a ſmuggling veſſel, and Mr. Juſtice *Buller* decided at *niſi prius*, that as it was eſtabliſhed that *Wood* was the defendant's agent for this purpoſe, any acknowledgment under his hand was evidence againſt his principal, as much as if it had been the acknowledgment of the defendant himſelf: the caſe was decided before the court upon the merits in favour of the defendant, and no diſcuſſion took place reſpecting the admiſſibility of this evidence. In *Banerman* v. *Rakenius*, 6 *T. R.* 665. it was ſaid in argument, that Lord *Kenyon* had frequently ruled againſt ſuch evidence at the ſittings, without its having ever been queſtioned, and his Lordſhip's own opinion, as expreſſed in that caſe, ſeems to be againſt the admiſſibility of ſuch evidence, which, according to the courſe of the cauſe, did not become a material queſtion; but the previous deciſion of *Senat* v. *Porter*, in the ſame volume, 158, alſo ſeems to be a deciſive authority in oppoſition to it. There the proteſt of a captain was ruled not to be evidence againſt his owners in favour of an inſurer, even although it had been communicated to them by the broker, which was contended to amount to a recognition of the facts which it repreſented. If this act, which reſults from the ordinary or more correctly ſpeaking, the conſtant courſe of nautical tranſactions, could not be allowed to affect the parties, by whoſe agent it was made, much leſs ſhould any diſtinct collateral repreſentation. When it is alleged that the act of the agent is the act of the principal, the propoſition is always to be qualified by the nature and apparent limits of the agency; but an authority to negotiate a contract, to receive goods or money, or do any other tranſaction in the courſe of buſineſs, by no means indicates an authority to bind the principal, by any naked collateral repreſentation of a fact, which has antecedently taken place; therefore the proper inquiry reſpecting the expreſſions as well as the other acts of an agent, is how far they fall within the actual or oſtenſible purpoſe of his delegation.

On the trial at *Niſi Prius*, of the caſe of *Fowler* v. *Padget*, the principal point of which is reported 7 *T. R.* 509. I remember that part of the evidence offered to prove, that the plaintiff had left his dwelling-houſe with intent to defraud or delay his creditors, was, that when creditors called at his houſe in *Mancheſter*, they were told that he had gone upon ſome buſineſs to *Yorkſhire*, when in truth he had gone to *London*. Upon the diſcuſſion of the admiſſibility of this evidence, of which my memory does not furniſh me with the reſult, and which is not noticed in the report, it occurred

occurred to me as a bye ſtander, that the evidence was not of the character of hearſay; that the point intended to be aſcertained, was not that the fact related was true; but that the anſwer given was purpoſely falſe; and that the intentional falſehood of an anſwer given to a perſon calling at his houſe, may lead to a concluſion of concealment, and conſequently of fraudulent intention. A preſumption of agency may be eaſily formed, with reſpect to the anſwers given to perſons calling at a man's habitation; the nature of ſuch anſwers, and the authority of giving them, being as much connected with the domeſtic economy of a houſe, as the tranſactions with cuſtomers are connected with the arrangements of a ſhop. It muſt be remembered that the adequacy of the concluſion, deduced from the fact of ſuch a miſrepreſentation being given, is a queſtion perfectly diſtinct from that which applies to the competency of the proof, as founded upon hearſay.

One of the caſes, which are mentioned as exceptions to the rule for the excluſion of hearſay evidence, is where it is adduced to ſhew that the teſtimony given by a witneſs upon the trial, is conſiſtent with his declarations on former occaſions; but it has been ſaid that this is not evidence in chief, and it is doubtful whether it be ſo in reply. 1 *Mod.* 283. According to the principles of correct reaſoning, the propriety of the evidence in this caſe as in the others already referred to, muſt depend upon the nature of the object which it is intended to attain. In an ordinary caſe the evidence would be at leaſt ſuperfluous, for the aſſertions of a witneſs are to be regarded in general as true, until there is ſome particular reaſon for impeaching them as falſe; which reaſon may be repelled by circumſtances, ſhewing that the motive upon which it is ſuppoſed to have been founded, could not have had exiſtence at the time when the previous relation was made, and which therefore repel the ſuppoſition of the fact related being an afterthought or fabrication. The ſuſpicion of an oppoſite conduct may reſult, either from the inherent nature and complexion of the evidence itſelf, or it may be indicated by the imputations actually thrown out in croſs-examination, or otherwiſe by the oppoſite party. If a witneſs ſpeaks to facts, negativing the exiſtence of a contract, and inſinuations are thrown out, that he has a near connection with the party on whoſe behalf he appears, that a change of market or any other alteration of circumſtances has excited an inducement to recede from a deliberate engagement; the proof by unſuſpicious teſtimony that a ſimilar account was given, when the contract alleged had every proſpect of advantage, removes the imputation reſulting from the oppoſite circumſtance, and the teſtimony is placed upon the ſame level which it would have had, if the

motives for receding from a previous intention had never had exiſtence. Upon accuſations for rape, where the forbearing to mention the circumſtance for a conſiderable time, is in itſelf a reaſon for imputing fabrication unleſs repelled by other conſiderations, the diſcloſure made of the fact upon the firſt proper opportunity after its commiſſion, and the apparent ſtate of mind of the party who has ſuffered the injury, are always regarded as very material, and the evidence of them is conſtantly admitted without objection. See *Eaſt, P. C. ch.* 10. § 5.

Caſes, where reputation is admitted as evidence, alſo appear in ſome degree, although more remotely than the other inſtances which have been adduced, to fall within the principle of the preceding obſervations, for in thoſe caſes the exiſtence of the fact of reputation is in general ſo cloſely and intimately connected with the fact reported, that from the proof of the one, it is a legitimate courſe of reaſoning to infer the exiſtence of the other; in the ſame manner as in other caſes, it is competent to argue from the viſible effect to the neceſſary or probable cauſe; and this principle accords with the diſtinction which is made between reputation of the general propoſition, which is the natural effect of the exiſtence of the fact propoſed, and evidence of what has been ſaid reſpecting particular circumſtances from which that fact may be inferred, for ſuch evidence is mere hearſay; the narration of the particular event is in this caſe, as in all others to which the objection applies, merely referrible to that particular event, which in itſelf is only a tranſitory incidental circumſtance. A general reputation that a road was a public highway, could only ariſe from the actual occurrence of the facts of which it was a natural conſequence; the circumſtance that *A. B.* had done an individual act, amounting to an indication of its being a highway, is as much inſulated and the relation of it as much remote from being an actual conſequence that the fact had occurred, as the relation that *A. B.* had murdered *C. D.*, is remote from being an actual conſequence of that event having neceſſarily taken place.

The firſt caſe in which reputation is admitted, is pedigree. It is almoſt impoſſible in moſt caſes to prove by direct evidence, the actual birth of the perſon whoſe filiation is a ſubject of inquiry, the few perſons having an immediate knowledge of the ſubject, are often dead long before the motive of inquiry ariſes; but the concurrent and conſequent facts are attended with a notoriety, which is ſo generally and almoſt ſo univerſally the effect of an actual occurrence of the principal fact to which it has relation, that it is acted upon with as much confidence as could be given to the moſt direct and poſitive aſſurances. In the caſe of the *King* v.

Eriſwell, which will be mentioned preſently, Lord *Kenyon* ſaid, that "the declarations of the members of a family, and perhaps of others living in intimacy with them, may be received in evidence as to pedigrees, but evidence of what a mere ſtranger ſays, has ever been rejected in theſe caſes." The terms *intimacy* and *ſtranger*, as applied to this ſubject are evidently extremely vague, the circumſtances attending conſanguinity are, in their own nature, calculated to induce an opinion, and conviction of the exiſting relation, and do not by any means neceſſarily depend upon the ſubſiſtence of a perſonal acquaintance. If for a ſeries of years, from infancy to manhood, I have ſeen a perſon treated, and heard him called the ſon of another living in my neighbourhood, it is not requiſite that I ſhould have ever ſpoken either to the one or the other, or to any of their family, in order to be convinced of the reality of the relation ſubſiſting between them. But independently of the reputation of the general fact of relation, there are ſome particular facts, the declarations reſpecting which are received in caſes of pedigree; and in theſe caſes there is a material difference between the acts of members of the ſame family, who are intereſted in the minutiæ of its occurrences, and perſons who have only a knowledge indicating the general ſubſiſtence of the relation; and upon theſe ſubjects there does not ſeem to be any material difference between written entries and verbal declarations. For inſtance, the time of birth is a matter reſpecting which the members of the family alone have in general an intereſt to take notice. In *Goodright* v. *Moſs*, *Cowp.* 591. it was decided that a mother's anſwer in Chancery, was evidence to ſhew that her ſon was born before marriage; and Lord *Mansfield* in alluſion to other caſes, that had been previouſly decided, ſaid tradition is ſufficient in point of pedigree: circumſtances may be proved. An entry in a father's family *Bible*, an inſcription on a tomb-ſtone, a pedigree hung up in the family manſion, (as the Duke of *Buckingham's* was,) are all good evidence. In the preceding caſe of *Goodright* v. *Moſs*, Mr. *Bar.* (afterwards Lord Chief Juſtice) *Eyre*, at *Niſi Prius*, refuſed to admit evidence of reputation, that the party was born before marriage. I think however the propriety of this determination is rather doubtful, for if reputation is evidence that *A.* was the ſon of *B.*, an oppoſite reputation at leaſt diminiſhes the weight of one argument in favour of that propoſition, and is in general as naturally (and perhaps more frequently) a conſequence of the actual fact on the one ſide, as the reputation of legitimacy on the other.

There is a diſinclination to baſtardize iſſue, which is ſometimes perhaps carried too far. When parties are actually married, and

there is no impoſſibility of the huſband being the father of the iſſue of the wife, every conſideration of decency and propriety repels the admiſſion of evidence to the contrary. But when the queſtion is, whether a perſon was or was not born during wedlock, it ſhould be recollected that the intereſts of juſtice are concerned in preventing one, who is really a baſtard, from uſurping the rights of the legitimate members of the family; and there is no particular reaſon of public policy, which requires that thoſe who have the real rights in their favour, ſhould meet with peculiar obſtacles in ſubſtantiating the proof of uſurpation.

In all queſtions of preſcription, reputation is univerſally admitted to be evidence; but I have already adverted to the rule, and the reaſons upon which it is founded, which confines ſuch evidence to the general right, and excludes it with reſpect to particular acts, by which that right may have been exerciſed, or otherwiſe manifeſted to exiſt.

In *Yates* v. *Harris*, *Gilb. Ev.* 77, an old map of lands was allowed as evidence, where it came along with the writings, and agreed with the boundaries adjuſted in an ancient purchaſe. I ſhould conceive that the deſcription of lands in old deeds would fall within the ſame principle, where the object was merely to ſhew the deſcription, that had been applied to the property at a given time, although the perſons againſt whom ſuch deeds were afterwards adduced were no parties to them; for there can be no other motive in ſuch deſcription, than to mark the object of the inſtrument; the contents of the deed can give no right againſt third perſons, and therefore there can be very little motive for inſerting a fictitious deſcription, of a co-exiſting ſubject which at the time will ſpeak for itſelf. I have known however ſuch evidence to be treated with great contempt, in the caſe of *Preſcott* v. *Philips*, *Trin.* 1798; adverted to *ante*, No. 15. Lord *Kenyon* applied to it, the epithets of ſtuff and nonſenſe. Mr. Juſtice *Aſhhurſt*, thought the evidence abſolutely inadmiſſible, becauſe it was poſſible that a man might chuſe to be a very great rogue for the ſake of poſterity. Mr. Juſtice *Groſe*.—It is the cleareſt caſe that ever was. Mr. Juſtice *Lawrence* was ſilent.—This diſcuſſion may at firſt ſight appear rather applicable to a different part of our inquiry; but I think theſe deſcriptions are very much to be aſſimilated to hearſay evidence of matters of reputation. In *Davies* v. *Pierce*, 2 *T. R.* 53. and *Holloway* v. *Baker*, cited, *ibid.* it was held that the declarations of former tenants, reſpecting the perſons under whom they held their farms, were properly admiſſible. This evidence ſeems to fall within the principle already adverted to, and referable to the written evidence laſt mentioned; being a matter of cotemporary deſcription,

tion, connected with and ariſing out of the actual exiſtence of the fact which it purports to indicate.

The admiſſibility of hearſay evidence in caſes of parochial ſettlement, formed one of the leading points upon which the judges of the King's Bench were equally divided, in the famous caſe of the *King* v. *Eriſwell*, 3. *T. R.* 707. The queſtion there agitated, has ſince been placed at reſt, as we have ſeen in a preceding ſection, (§ 9.) but the diſcuſſion reſpecting it will continue to preſerve its utility, in the expoſition of this branch of the law of evidence.

Declarations of a perſon under the apprehenſion of impending death, are alſo ſometimes admitted as evidence, chiefly in caſes of murder, where the declarations of the dying perſon are admitted to affect the party accuſed, upon the principle, that the mind is under theſe circumſtances as much impreſſed with the obligations of adherence to truth, as when ſpeaking under the ſanction of an oath; and the reaſoning ſo far as it goes is certainly well founded; but while the veracity of theſe declarations is admitted, it is highly important to uſe an anxious caution in deciding upon the effect of them. The ſanction of an oath is only one part of the benefit of a judicial examination, and only one of the reaſons for the excluſion of hearſay evidence; the opportunity of inveſtigating the accuracy of the evidence, of applying queſtions, by the anſwers to which it may be explained or qualified, is an important circumſtance, and this is wholly loſt. Much conſideration alſo ſhould be given to the ſtate of mind of the party whoſe declarations are received. Strongly as his ſituation is calculated to induce the ſenſe of obligation, it muſt alſo be recollected, that it has often a tendency to obliterate the diſtinctneſs of his memory and perceptions; and therefore, whenever the accounts received from him are introduced, the degrees of his obſervation and recollection is a circumſtance which it is of the higheſt importance to aſcertain. Sometimes the declaration is of a matter of judgment of inference and concluſion, which however ſincere may be fatally erroneous; the circumſtances of confuſion and ſurprize, connected with the object of the declaration, are to be conſidered with the moſt minute and ſcrupulous attention; the accordance and conſiſtency of the fact related, with the other facts eſtabliſhed by evidence, is to be examined with peculiar circumſpection, and the awful conſequences of miſtake muſt add their weight to all the other motives, for declining to allow an implicit credit to the narrative, on the ſole conſideration of its being free from the ſuſpicion of wilful miſrepreſentation.

The exiſtence of an apprehenſion of death, at the time of mak-

ing the declarations, is to be inferred, either from the cotemporary or previous declarations of the party, or from the nature of his ſituation being ſuch, as neceſſarily to induce that impreſſion. It was agreed upon a conference of all the judges in *Eaſter Term*, 1790, that it ought not to be left to the jury to ſay, whether the deceaſed thought he was dying or not, for that muſt be decided by the judge before he receives the evidence, 1 *Eaſt*, *P. C. c.* 5. § 124. I am aware how much I ſubject myſelf to the imputation of preſumption, in hazarding a doubt upon the correctneſs of a poſition which has been ſo eſtabliſhed; but feeling the doubt, the mode of inquiry which upon deliberation I have adopted as having the moſt utility, obliges me to expreſs it; and if in doing ſo I unintentionally incur the charge of diſreſpect to the particular opinion of the particular judges, I ſhall have ſome excuſe when it is conſidered that my motive is a ſuperior reſpect to the fundamental principle of law, that queſtions of fact are excluſively the province of the jury. The relevancy of the evidence to the charge, the effect of the concluſions to be deduced from it, (ſuppoſing thoſe concluſions to be aſcertained,) the propriety of ſubmitting it to the jury, with reſpect to the concluſion which ſhall be inferred, are properly within the conſideration of the judge. The judge upon the anterior evidence of apprehenſion, muſt decide as to the reception of the ſubſequent evidence of declaration; thus far is mutually agreed—but the evidence from which the apprehenſion is inferred may be true, or falſe; the inference deduced from it may be correct, or erroneous; the ſum of the inquiry is the queſtion of fact, whether the deceaſed did or did not act under the apprehenſion imputed; queſtions of veracity, queſtions of inference, and the reſulting queſtions of fact are in all other caſes allowed to belong to the deciſion of the jury; and the propriety of the deciſion of the judge in favour of receiving the declaration, by reaſon of evidence indicating the apprehenſion of approaching diſſolution, is no more concluſive upon the jury, in admitting the relation of the circumſtances, by which the apprehenſion is ſuppoſed to be manifeſt, to be true, or the inference deduced from the relation, to be correct, than the declaration itſelf is concluſive upon them, as to the veracity of the party deceaſed, or the accuracy of his repreſentation. According to a fair analogy to other proceedings, the direction ſhould be previous to conſidering the effect of the declaration; to determine, 1ſt, whether the deceaſed was really in ſuch circumſtances, or uſed ſuch expreſſions, from which the apprehenſion in queſtion was inferred: 2d, Whether the inference deduced from ſuch circumſtances or expreſſions is correct: 3d, Whether the deceaſed did make the declarations alleged againſt

againſt the accuſed: 4th, Whether thoſe declarations are to be admitted as ſincere and accurate.

In *Wright* v. *Clymer*, 3 *Bur.* 1244. it came out by the defendant's re-examination (or as it is called croſs-examination), of a witneſs produced by himſelf for a different purpoſe, that one *Medlycott*, who had written and atteſted the inſtrument under which the defendant claimed, acknowledged in his laſt illneſs that he had forged it; to which evidence no objection was made by the counſel for the defendant at the trial; but upon an application for a new trial they objected againſt it as hearſay evidence. Lord *Mansfield* with reference to this objection, ſaid, "It came out upon their own croſs-examination; they made no objection to it at the trial. The competence of evidence depends upon the circumſtances under which it is given. Even though it had been upon an examination by the plaintiff, eſpecially as it was all written and witneſſed by *Medlycott*, and gave the premiſes in queſtion to his wife, as the account was a confeſſion of great iniquity, and as he could be under no temptation to ſay it, but to do juſtice, and eaſe his conſcience, I am of opinion, that the evidence was proper to be left to the jury."

The admiſſion of hearſay evidence was one of the points in diſcuſſion in the famous *Douglas* cauſe, and is the principal ſubject of one of the letters of Mr. *Andrew Stuart* to Lord Mansfield. The queſtion in that caſe was whether Lady *Jane Douglas* had been delivered of twins at *Paris*, on the 10th of *July*, 1748. The truth of this poſition was impeached on ſeveral grounds, which it will not be here neceſſary to advert to, as the preſent diſcuſſion is only relative to the admiſſibility of the evidence; neither will it be neceſſary to examine how far the inference intended to be deduced from the particular evidence, was combated by any other facts in the cauſe. It was alleged by Lady *Jane* and her huſband, that ſhe had been delivered by the aſſiſtance of a ſurgeon of the name *Pier la Mar*; this was treated on the oppoſite ſide as a fiction and invention, and it was ſaid that no ſuch perſon could be found to have had an exiſtence. In ſupport of the filiation, evidence was given that a ſurgeon of the name of *Delamarre*, at a time coinciding with that in queſtion, ſpoke of delivering a foreign lady of advanced age, of great family in her own country, and who had come laſt from *Rheims*, (which deſcription accorded with Lady *Jane*,) of twins; the objections againſt the probability of this account, and the want of coincidence between this *Delamarre*, and the deſcription given of the ſurgeon who attended Lady *Jane* are here omitted, as they apply rather

to the effect and conſequence of the evidence than to the propriety of attending to it, if free from any ſuch obſervations.—The following preliminary obſervations, by Mr. *Stuart*, upon the general nature of the ſubject, place in a very perſpicuous point of view the general nature of the objections againſt hearſay evidence. "Hearſay evidence is, in general, of very little conſequence, and ought never to be regarded, except where, for want of direct and poſitive proof, the judge is neceſſitated to give a determination even upon ſuch ſlight probabilities as are laid before him. For, beſides that a teſtimony of this kind is weakened by its removal from the firſt ſource, it is liable, from its very nature, to important objections, which greatly diminiſh its authority. Very few perſons impoſe on themſelves ſuch ſtrict laws of veracity, that every word which drops from them in converſation can be regarded as a judicial teſtimony.—Vanity, ſelf-intereſt, love of talkativeneſs, a variety of motives, even the moſt frivolous, make people indulge themſelves in fictions of this nature; and they think themſelves the more ſecure, both as a detection is not attended with any important conſequence, and as their companions never dream of ſifting their ſtory, or examining circumſtances, ſo as to render the detection poſſible."

"If ſuch narratives have ſmall authority at firſt hand, what weight is due to them when repeated, after an interval of many years, by perſons who were noways intereſted in the original event? The memory of men is never ſo tenacious as to retain, with any tolerable exactneſs, circumſtances which entered merely by the ear, which could at firſt make but a ſlight impreſſion upon them, and which they never, during a very long interval, had any occaſion to recollect. Every one's experience may convince him, that no converſation was ever repeated by four or five perſons, even next day, without ſome material variations, and ſometimes contradictions in the circumſtances. But if innocent error be ſo natural, and even unavoidable in ſuch teſtimony, what muſt be the caſe where the leaſt ſuſpicion of fraud, or corruption, or even partiality, is allowed to enter? A perſon who relates a hearſay is not obliged to enter into any particulars, to anſwer any queſtions, to ſolve any difficulties, to reconcile any contradictions, to explain any obſcurities, to remove any ambiguities: he intrenches himſelf in the ſimple aſſertion that he was told ſo, and leaves the burden entirely on his dead or abſent author."

With reſpect to the admiſſibility of the evidence in the caſe referred to, I conceive that the general principle of the objection will not be found to apply, when the real propoſition intended to be eſtabliſhed is attentively conſidered.—If the enquiry had reſted merely

merely upon the abſtract queſtion—whether Lady *Jane*, at the time referred to, had or had not been delivered—and the parties alleging ſuch birth had, in order to prove it, offered the kind of declaration now under diſcuſſion, it would have been a mere naked caſe of hearſay; but that is not a correct view of the nature of the diſpute; the filiation was ſupported by the uſual evidence of nurture, education, and repute, by all thoſe circumſtances which are *prima facie* ſufficient; the truth of it was impeached by collateral circumſtances, and amongſt the reſt by the imputation that the ſurgeon, whoſe name was adduced, was a mere fiction, and the improbability that *Delamarre*, the ſurgeon, proved to have had an exiſtence, could be the perſon intended, or could have been ſo connected with Lady *Jane* and her huſband.—But if at the ſame time *Delamarre* had held converſations importing ſuch a connection, agreeing in the leading particulars with the facts related to have paſſed, ſuch a concurrence of circumſtances, as that Sir *John Stewart* and Lady *Jane* ſhould, at mere random, have taken up the name of *La Marre*, a fiction and non-entity; and that *Delamarre*, at the very time to which that relation was applied, ſhould have, of his own head, invented a fictitious ſtory, coinciding in its leading particulars with the fiction adopted by other perſons, with whom he had no connection or intercourſe, is marked with the higheſt degree of improbability; the converſation in queſtion would therefore almoſt neceſſarily indicate the exiſtence of a connection with reſpect to the event in queſtion—whether a connection, in aſſiſting upon a real delivery, or in aiding the falſe aſſertion of one, is a different queſtion, to be decided by other circumſtances. Suppoſing ſuch a converſation to have paſſed, and to have been truly related, it removes the argument which it was intended to oppoſe, ariſing out of the fabrication of the name of *La Marre*, and the want of connection between Lady *Jane* and *Delamarre*.

There are ſome caſes reſpecting the admiſſibility of the declarations of perſons againſt others with whom they are connected, the principle of which has already been in ſome degree examined, with reſpect to a principal being affected by the declarations of his agent—but which will more properly fall under conſideration in a following ſection.

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SECTION XII.

Of the Competence of Witneſſes, and of ſome particular Exceptions to Teſtimony.

It would perhaps have appeared to be a more methodical arrangement of the ſubjects, if the competence of witneſſes had been examined previous to the inſertion of the preceding ſections, reſpecting their number and the nature of their teſtimony, but the preference is not of ſufficient importance to induce me to deviate from the courſe of my author.

In the treatiſe of *Pothier* we have ſeen, that the law of France required ſeveral qualifications with reſpect to the atteſtation of formal inſtruments, which were not neceſſary in witneſſes adduced to prove a matter of fact; women, foreigners, monks profeſſed, who were all excluded from the former, were ſufficient witneſſes for the latter. For the parties can chooſe what witneſſes they will for the purpoſe of a ſolemn atteſtation, whereas they muſt take ſuch witneſſes to a fact as the circumſtances afford.

The general objection to a witneſs were the want of diſcretion, perſonal infamy, cauſes which lead to a ſuſpicion of partiality, to which was added the ſuſpicion of ſubornation.

It is obſerved by *Gilbert* that idiots and infane perſons are obviouſly incapable of being witneſſes, upon which Mr. *Lofft* remarks, that this muſt be underſtood of ſuch as manifeſtly are within the deſcription of this deplorable calamity; otherwiſe defect, or inconſtancy of underſtanding, not clearly to this extent, will affect their credit but not their competency to be examined. Yet of an inſane perſon it might, for defect of other evidence, merit to be conſidered, whether in civil caſes at leaſt, the teſtimony of ſuch might not be admiſſible, upon points where his underſtanding did not appear to be ſubject to diſturbance; it being well known that in many of their melancholy inſtances, eſpecially where the reſult of ſome violent paſſion, the party affected is entirely cool, clear, and recollected in his ideas, and as free as other perſons from the deluſions of a perverted imagination, in every thing not connected with the cauſe of his inſanity: with regard to perſons who have only temporary fits of madneſs, (then uſually termed lunacy,) and at other times are in all reſpects ſound of reaſon, theſe are then conſequently as capable of teſtimony as of any other legal act.

According to the law of England, there is no fixed time at which children are excluded from giving evidence, but the reaſon and ſenſe of their evidence is to appear from the queſtions propounded,

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and their anſwers to them.—*Gilb.* 144. And Mr. *Loffi* obſerves, that as children of very tender years are capable of being legally conſidered as capital offenders, much more are they capable of being witneſſes.

There are caſes in which infants of the age of ſix years were held inadmiſſible as witneſſes to prove a rape, or an aſſault with an intent to commit a rape; but in the caſe of the *King* v. *Brayne*, 12 April, 1779, *Bull. N. P.* it was determined by all the judges, that an infant of the age of five years might be ſworn and give her evidence upon oath, provided ſhe have diſcretion, and be acquainted with the nature of an oath.

Sir *Mathew Hale* expreſſes an opinion, that where the information from the party injured is peculiarly eſſential, it may be expedient to hear an infant, though the court ſhould think it unfit to ſwear her; but this ſentiment is now univerſally exploded.

It is cuſtomary when children are adduced as witneſſes, to make a preliminary examination, in order to decide upon the extent of their underſtanding, and their ſenſe of moral and religious obligation; but it may deſerve conſideration, whether ſuch a deciſion could not be as accurately formed by attending to their examination upon the ſubject in diſpute, as by their anſwers to the queſtions which are now commonly uſed as a touchſtone.

The next objection is perſonal infamy. This objection was of much greater extent in the civil law than it is in the law of England, and in France included perſons in a ſtate of mendicity, and thoſe againſt whom a decret (or warrant of apprehenſion) had iſſued for any criminal offence, until they were legally acquitted of the charge.

According to the law of England, a conviction and judgment for a capital felony, is a diſqualification from being a witneſs; but where the conviction is for a felony within benefit of clergy, the allowance of clergy, and the conſequent puniſhment, is a reſtoration of competency. The ancient puniſhment upon this occaſion was a burning in the hand, which was treated as having an influence to purge the offence.

But the offence of petty larceny being a caſe of felony in which inferior puniſhments were inflicted originally, and not by way of commutation, the rules concerning the benefit of clergy did not apply to it, and as there was no purifying proceſs, the ſtain, once contracted, continued after the puniſhment was complete.

This abſurdity continued until the 31ſt year of his preſent Majeſty, when it was enacted, that no perſon ſhall be an incompetent witneſs by reaſon of having been convicted of petty larceny, c. 35. Although nothing can be more general and explicit than the language

guage of the act, I have known it decided in an inferior court that a perſon under ſentence of impriſonment for petty larceny was incompetent, until after the impriſonment had expired. This was adopting, by way of analogy, the rule in caſes of grand larceny; but nothing can be more repugnant to reaſon than reſorting to analogy for the purpoſe of altering the plain interpretation of language, perfectly unambiguous in itſelf, and leading to no abſurdity in its conſequences.

Of offences inferior to felony, thoſe which may be ſtated as certainly diſqualifying a witneſs, are, perjury, forgery at common law, and barratry.

It was formerly held, that the infamy of the puniſhment of ſtanding in the pillory was a diſqualification, but I conceive that modern opinions are uniform, that the diſqualification muſt proceed from the infamy, not of the puniſhment, but the crime.

In order to ſupport the objection to a perſon's evidence on the ground of infamy, the record of conviction and judgment, or a copy of it properly authenticated, muſt be produced; no other evidence of the commiſſion of the crime is admiſſible; and a verdict upon an indictment for perjury, without a judgment, has been ruled to be inſufficient.

It has been a matter of debate, whether the King's pardon reſtores the competency which is loſt by the conviction of an infamous crime; *Gilbert* adopts the opinion that it does; but in caſe of a conviction for perjury on the ſtatute, the King's prerogative of pardon is expreſsly excluded.

Under this kind of excluſion may alſo be ranked perſons excommunicated. Mr. *Lofft* enumerates the cauſes of excommunication, and expreſſes his ſurprize that they remain as unrepealed exceptions to the competence of witneſſes.

A general infamy of character may defeat the credit of a witneſs, but does not affect his competency. And it is only allowed in reſpect of the queſtion of credit to give general evidence, and not to enter into a detail of particular facts, as has been already mentioned in a former ſection, upon the examination of witneſſes.

The cauſes which lead to a ſuſpicion of partiality, and which exclude the teſtimony of witneſſes in the civil law are, as may be ſeen by the Treatiſe in the preceding volume, very numerous, and ſeem to extend to almoſt every circumſtance which can tend to influence the wiſhes of a perſon in reſpect to the event. They exclude relations, ſervants, profeſſional agents, and (ſubject to certain diſtinctions) thoſe who are engaged in any ſuit with either of the parties. The ſlighteſt reflection muſt evince the impolicy of

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ſuch a rule. The grand foundation of judicial rectitude is, as I have frequently had occaſion to take notice in the courſe of the preſent number, an accurate and complete information of the facts to which it is applied; and the allowing a mere ſuſpicion of partiality in thoſe, to whom ſuch facts are often moſt familiarly known, indiſcriminately to preclude the admiſſion of that teſtimony, which may be eſſentially requiſite to the intereſts of juſtice, is a very diſproportionate ſacrifice of a certain advantage to the avoidance of contingent evil.

Any circumſtances calculated to induce either partiality or enmity, may be very properly, and, as I conceive, very ſufficiently eſtimated in deciding upon the credit which ought to be given in each particular inſtance; additional caution will be excited, and the conſiſtency of the evidence, taking one part of it with the other, its coherence with undiſputed or well eſtabliſhed circumſtances, its internal marks of probability, the demeanour of the witneſs, will all be more accurately examined, and this will, upon the general average, induce a more accurate knowledge of the facts in queſtion, than a courſe of proceeding which, whilſt it is occaſionally uſeful in the prevention of falſehood, is continually injurious in the ſuppreſſion of truth.

Even the benefit ariſing from the excluſion of thoſe perſons as witneſſes, who have a direct and immediate intereſt, is, as a general queſtion, very problematical.

Mr. *Fonblanque*, in one of his excellent notes to the Treatiſe of Equity obſerves, that no rule can be more reaſonable in a general view, than that which requires the teſtimony by which any fact is eſtabliſhed, to be free from that bias which an intereſt in the event might, even imperceptibly, give to the mind of a witneſs: but this rule, though ſo admirable in its principle, is, perhaps, of all the rules of evidence, the moſt flexible in its application; the variety of influences to which the human mind is ſubject, may be conſidered as intereſts which it more or leſs anxiouſly conſults. The voice of nature may be ſuppoſed to give a bias to the teſtimony of thoſe who ſtand in the relation of blood; and, according to even the worldly conſtruction of intereſt, the child is intereſted in preſerving the character and defending the property of its parent; but it is a ſpecies of intereſt which the law does not apprehend to be likely to ſuperſede the rights of truth and juſtice, and therefore a child, by our law, may be a witneſs for or againſt his father. The habits of friendſhip may have ſo blended the claims of character, that the teſtimony of a friend may, in ſome inſtances, be conſidered as the teſtimony of a man in his own behalf, but the law does not reject ſuch teſtimony; it may indeed in

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ſuch inſtances be influenced by a more powerful motive than the proſpect of acquiring or preſerving wealth, but it is a conſideration which does not diſqualify the witneſs, however it may weigh in eſtimating his credit. What then, it may be aſked, is intended by the intereſt which excludes the teſtimony of a man, whoſe teſtimony is in other reſpects unimpeachable? It is a melancholy reflection, that though the law of England conceives the claims of truth to be ſufficiently ſtrong to repreſs the feelings of nature, and the not leſs powerful dictates of friendſhip, it dares not truſt the intereſts of juſtice to that ſpecies of influence which the ſmalleſt, preſent, actual or ſuppoſed pecuniary benefit may excite: "I mean not (he adds) to arraign the wiſdom or policy of the law.—I have already ſtated it to be of all the rules of evidence the moſt flexible in its application, that liberal ſpirit which ever accompanies the truly enlightened mind, having modified its rigour by diſtinguiſhing that actual intereſt which goes to the competency of teſtimony, and that influence which merely affects the credit of it."—Whatever juſtice there is in the general tendency of the preceding obſervations, the law of England, ſo far as it differs from that of other countries, is rather an exception from, than a peculiar object of, the cenſure which they import.

In diſcuſſing the nature of that intereſt which induces the diſqualification of a witneſs, *Gilbert* obſerves—that it is where there is a certain benefit, or diſadvantage to the witneſs, attending the conſequence of the cauſe one way.

Few ſubjects have produced a greater multiplicity of deciſions than the extent and application of this rule, and amongſt thoſe deciſions there is a conſiderable degree of contrariety. That which is an intereſt, and that which is merely a cauſe of influence, have been confuſed and blended together; but the neceſſity of comparing and examining a diffuſe claſs of caſes, and the difficulty of reconciling and diſtinguiſhing them, is in a great degree prevented by the judicious and accurate inveſtigation which took place in the modern determination of *Bent* v. *Baker*, 3 *T. R.* 27, which is now regarded as furniſhing the proper criterion in all diſputed caſes.

That was an action on a policy of inſurance, and the broker who had effected the policy, and who had himſelf ſubſcribed it, after ſeveral other perſons, was adduced as a witneſs to ſhew that the policy was void.

His teſtimony having been rejected at *Niſi Prius* by Lord *Loughborough*, the caſe was brought, by bill of exceptions, before the court of King's Bench, who ruled the evidence to be admiſſible. There was a writ of error in the Houſe of Lords, and the matter

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was finally ſettled by compromiſe, but the opinion of the court of King's Bench has been ſince conſidered as fixing the general ſtandard upon queſtions of competence.

It had been formerly decided, that one underwriter could not be a witneſs for another upon the ſame policy, and that deciſion had been generally followed, the ground of it being, that although the witneſs had not an intereſt in the particular cauſe, he was intereſted in the queſtion which it involved upon the validity of the policy. There were ſeveral ſpecial circumſtances upon which, in *Bent* v. *Baker*, it was held that the evidence ought to have been received, particularly the neceſſity ariſing out of the witneſs's character as broker. But the grand point which the caſe eſtabliſhed was, that a witneſs ſhall not be rejected as incompetent, unleſs he has an intereſt in the event of the cauſe. Upon that point Lord *Kenyon* expreſſed himſelf as follows: "I muſt acknowledge that there have been various opinions upon this ſubject, and that it is impoſſible to reconcile all the caſes. Then we have only to conſider what are the principles and good ſenſe to be extracted from them all; I think the principle is this, if the proceedings in the cauſe cannot be uſed for him he is a competent witneſs, although he may entertain wiſhes on the ſubject; for that only goes to his credit, and not to his competency; as where he ſtands in the ſame ſituation with the party for whom he is called to give evidence, there is no doubt but that it may influence his teſtimony; or where a father is giving evidence for the ſon; but this does not render him incompetent, and ſuch circumſtances are always open to obſervation. So here the witneſs might have had his wiſhes; his ſituation might have created an influence upon his mind, but the queſtion ſtill is, whether he was a competent witneſs: on the grounds already ſtated, I think that he was." And after obſerving upon ſome of the particular circumſtances, he ſaid, "However, theſe are only the ſmall points of the cauſe, and I again recur to that which is the principal ground of my opinion, namely, that the witneſs was not intereſted in the cauſe then depending."

Mr. Juſtice *Buller*'s opinion ſeems to have been principally founded upon the particular circumſtances, but he ſaid that on the general ground he inclined to think that there was no objection to the competency. The true line he took to be this, *is the witneſs to gain or loſe by the event of the cauſe?* Now the witneſs could not gain or loſe by the event of this cauſe, becauſe the verdict could not be evidence either for or againſt him in any other. Mr. Juſtice *Groſe*, with reſpect to the general queſtion, whether the witneſs's being intereſted in the general queſtion put to him ſhall render him incompetent, as well as his being intereſted

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in the event of the ſuit, ſaid—" I think it is better to narrow the objections to thoſe caſes where the witneſs is intereſted in the event of the cauſe." And after a conſiderable interval Lord *Kenyon* ſaid—" The caſe of *Bent* v. *Baker*, laid down a clear and certain rule, by which I have ever ſince endeavoured to regulate my opinion in cauſes coming before me at *Niſi Prius*, though probably I may not have decided properly in every inſtance, when called upon to form an opinion on the ſudden. The rule there laid down was, that no objection could be made to the competency of a witneſs upon the ground of intereſt, unleſs he were directly intereſted in the event of the ſuit, or could avail himſelf of the verdict in the cauſe, ſo as to give it in evidence, on any future occaſion, in ſupport of his own intereſt." *Smith* v. *Pragu*, 7 *T. R.* 60.

It will not be neceſſary to enter into a detail of the numerous caſes which have occurred upon this ſubject, or an examination how far they have been individually conformable to, or variant from the ſtandard which is now eſtabliſhed, and according to which a witneſs is not incompetent, unleſs he has an intereſt in the event of the cauſe. The diſtinction between an intereſt in the queſtion propoſed and in the event of the cauſe, cannot be more ſtrikingly illuſtrated than by the immediate ſubject to which the caſe of *Bent* v. *Baker* relates—the admiſſion of one underwriter in behalf of another upon the ſame policy.

In the application of the rule which is now eſtabliſhed, and of the adjudications reſpecting it, it will be an important caution to avoid drawing too general concluſions from particular premiſes, and to attend to the obſervation of Mr. Juſtice *Buller*, in the caſe of *The King* v. *Proſſer*, 4 *T. R.* 19, " That the queſtion whether evidence be admiſſible or not, depends upon the ſubject matter to which it is applied." For inſtance, it is decided generally, that a tenant cannot be a witneſs to ſupport his landlord's title, as he is liable to an action for *meſne* profits, if his landlord is defeated: provided the declaration in ejectment is ſerved upon the tenant, it may be aſſumed for this purpoſe, that a judgment againſt the landlord, who is ſubſtituted under a rule of court, may be good evidence againſt ſuch tenant in an action for *meſne* profits, as the tenant had an opportunity of maintaining his own perſonal intereſt; but a former tenant, or one who came in pending the proceedings, and quitted the premiſes before the trial, could not, in any action againſt himſelf, be affected by proceedings which he had not an opportunity to conteſt, and would therefore have no intereſt, on the ground ſuggeſted, in the event of the cauſe.

Where the intereſt of a community, as a pariſh or corporation, is in queſtion, the members of that community are not in general admiſ-

admiſſible witneſſes. Thus, where a corporation were lords of a manor, and having approved part of a common, demiſed it, reſerving rent to the mayor and bailiffs; it was contended that freemen might be witneſſes, to prove that there was a ſufficiency left, becauſe they had no intereſt at all, the rent being reſerved to the mayor and bailiffs, and the freemen not having the direction of the corporate funds: and ſecondly, that the intereſt was too minute to operate as an objection to their teſtimony; but it was anſwered by the Court, that the rent muſt be reſerved for the uſe of the corporation, and therefore the objection muſt prevail, however ſmall the intereſt may be in reality. *Barton* v. *Hindle*, 5 *T. R.* 174. The effect of this objection appears to be often prejudicial in ſhutting out the due inveſtigation of truth, but while the general principle of the objection is allowed, it would be highly improper to ſubject it to the fluctuation of opinions upon the degree of intereſt in particular caſes; and any corrective of the exceptions upon general grounds, can only be applied by legiſlative authority.

But ſtill the objections muſt be underſtood as ſubſervient to the grand criterion of *Bent* v. *Baker*—*an intereſt* in the event of the cauſe. On this account it has often been held, and is now a familiar matter of practice, that a liability to be rated to the poor does not diſqualify a perſon not actually rated, from being a witneſs on a penal ſtatute, giving part of the penalty to the pariſh. In the caſe above referred to, of *The King* v. *Proſſer*, 4 *T. R.* 17, it was ruled, that on an appeal, by ſeveral perſons, for not being rated to the poor, (which was an election qualification,) a perſon poſſeſſed of rateable property in a pariſh, was a competent witneſs to prove that they ought to be rated; upon which occaſion Mr. Juſtice *Buller* made the obſervation already cited, that the queſtion whether the evidence be admiſſible depends on the ſubject matter to which it is applied. It is alſo decided, that the owners and occupiers of rateable property within a pariſh, are good witneſſes for a pariſh, and compellable to give evidence on the other ſide, unleſs actually rated. *Rex* v. *South Lynn*, 5 *T. R.* 664. *Rex.* v. *Little Lumley*, 6 *T. R.* 157.

This deciſion, at leaſt ſo far as affects the owners, is a departure from the common ſtandard, for although, in caſe of a penalty, the application of which is a matter of tranſient nature, the intereſt may depend upon the circumſtance of being actually rated; the deciſion of a ſettlement caſe produces a permanent effect, by either liberating or charging the pariſh to an indefinite period; a proportion of that permanent charge therefore falls upon the property, in which the owner has only parted with a temporary intereſt, and

which, beyond the extent of that intereſt, muſt be increaſed or diminiſhed in value to himſelf, according to the deciſion of the caſe.

Since making theſe obſervations it has been decided, in the caſe of *The King* v. *the Inhabitants of Kirdford*, 2 *Eaſt*, 559, that an occupier, whoſe name was purpoſely omitted in the rate, was a competent witneſs, although it was contended, that he was eventually intereſted in the conſequences, as he might be put on the next rate, while the ſame burthen ſubſiſts—but the Court held that it was perfectly contingent whether the witneſs would be intereſted or not, he might die, or part with his property before the making the next rate, and he could not be rejected on the mere ground of an expectant intereſt.—From the conſtant tenor of my obſervations, it is evident that I am no friend to extending the exceptions againſt the competence of witneſſes, but upon frequent conſideration of the ſubject, I cannot think that the mere circumſtance of a witneſs not being included in the exiſting rate, is, upon the principles of accurate reaſoning, an anſwer to the objection, unleſs by contract, or otherwiſe, his ſecurity from a legal liability to the rate is as extenſive as his intereſt in the rateable property, or the liability of that propertyto the charge which is the ſubject in diſpute. The laſt rate is immaterial to the queſtion of intereſt—that rate is fixed, and muſt be paid. The deciſion of the ſettlement induces the neceſſity of an earlier or a greater rate being afterwards made; or it relieves from that neceſſity, and the perſons intereſted in the queſtion are thoſe upon whom the liability to ſuch new, or additional rate, may fall. And if that rate may, in conſequence of the permanent nature of the charge, impoſe a permanent liability on the property, thoſe who have a permanent intereſt in the property have an actual intereſt in the deciſion. It cannot, I conceive, be correctly ſaid, that the intereſt is contingent, merely becauſe the ground of it may poſſibly ceaſe before the operation of it attaches. The continuance of matters in their exiſting ſtate cannot reaſonably be conſidered a ſa contingency, otherwiſe a ſhort anſwer might be given to all objections of incompetence. Corporators, tenants actually rated, or any other perſons may die, or ceaſe to bear the character which is the cauſe of the objection. The pauper may die, or, being a female, may marry. The anſwer of an intereſt being contingent, only applies if ſome future event, which may or may not happen, muſt neceſſarily take place before the intereſt can ariſe; but where the character already exiſts, the poſſibility of its removal does not deſtroy the conſequences of it. It is the removal only of the intereſt that is contingent, and when the contingency takes place, the conſequences of its exiſtence will determine. To try the queſtion of intereſt with reſpect to

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the preſent ſubject, by a poſſible and not very improbable caſe—a township conſiſts of a ſingle farm, (and in the county of Cheſter there are many townſhips of that deſcription)—the farm is in the occupation of a tenant from year to year, and no rate is actually made. The queſtion relates to the acquiſition of a ſettlement by an aged perſon, who has a numerous train of deſcendants that have not acquired any ſettlement in their own right. Has the landlord no intereſt in the event? At the end of the current leaſe he will have to pay, or be relieved from paying, as the deciſion may be, for the maintenance of the family, or he will let the eſtate ſubject to the charge, or he will ſell it; but will there be no difference in the rent or price, according to the oppoſite contingencies of the exiſtence or non-exiſtence of the burthen?

Whatever is the proper anſwer to the queſtions propoſed in this great ſcale, cannot be the improper anſwer in any other caſe depending upon the ſame principles, unleſs it is aſſerted that the magnitude of the intereſt is the true criterion for deciding upon the weight of the objection.

In ſome inſtances the legiſlature has interpoſed to deſtroy the objection of incompetence, as applicable to the members of a community. Thus by 3 & 4 *W. c.* 11. pariſhioners, other than ſuch as receive alms (*a*), may be witneſſes in actions in the courts at Weſtminſter, or at the aſſizes, for money miſ-ſpent, or taken by churchwardens or overſeers of the poor. By 1 *Anne, c.* 18, inhabitants of counties, &c. may be witneſſes reſpecting perſons, or corporations, being obliged of right to repair bridges. By 27 *Geo.* 3. *c.* 19, in actions on penal ſtatutes, inhabitants of any place or pariſh are good witneſſes to prove the offence, notwithſtanding the penalty being given to the poor, or otherwiſe, for the benefit of the pariſh or place, provided the penalty does not exceed 20*l.*

Where a truſtee, or executor, has no beneficial intereſt, it ſeems clearly ſettled that he may be examined as a witneſs. *Vid. Lowe* v. *Jolliffe*, 1 *Bl. Rep.* 365. *Goodtitle* v. *Welford*, *Doug.* 139.

Even where there is an intereſt there are ſeveral excepted caſes to which the objection of incompetence does not extend.

I ſhall not enumerate the ſeveral grounds of exception which have been ſtated in the books upon the ſubject, ſome of which are founded upon the particular courſe of proceeding in courts of equity, and others (for inſtance the remoteneſs and inſignificance of the intereſt) are very diſputable; but merely advert to a few of the moſt important and beſt eſtabliſhed inſtances.

The firſt of theſe is, that an intereſted witneſs ſhall be admitted from neceſſity. The neceſſity here referred to is that which ariſes

(*a*) This exception is rather curious, for ſuch perſons are very ſeldom rated, and are therefore in general not incompetent.

from the general ſtate and order of ſociety, and not that which is merely founded on the accidental want or failure of evidence in the particular caſe. Thus ſervants and agents are allowed to prove the delivery of goods, or the payment of money, although by doing ſo they remove the reſponſibility originally incumbent on themſelves. But where the action is againſt the maſter, on account of the negligence or miſconduct of the ſervant, the latter cannot be a witneſs for the former, to whom he is anſwerable over, without a releaſe. *Green* v. *New River Comp.* 4 *T. R.* 589.

A perſon robbed is, by mere conſtruction of law, without any ſtatutable proviſion, allowed to give evidence in an action againſt the hundred, except in certain caſes provided for by ſpecial acts of parliament.

One of the grounds of the deciſion in the caſe of *Bent* v. *Baker*, was the neceſſity that a broker who had effected a policy, and who from the nature of his ſituation muſt be the beſt witneſs to many purpoſes, and was the only witneſs who, from the nature of the thing, could ſpeak as to any repreſentation made by him to the underwriters, ſhould not be precluded from diſcloſing what was material in favour of the underwriters, and it was upon this point that Mr Juſtice *Aſhhurſt*, who declined giving an opinion on the great queſtion in the cauſe, principally relied.

Another general exception is, that a perſon ſhall not, by his own act, render himſelf an incompetent witneſs, when a party has acquired an intereſt in his teſtimony, as by laying a wager on the event of the cauſe. *Bull. N. P.* 290. This alſo was a point in the caſe of *Bent* v. *Baker*, in which Mr. Juſtice *Groſe* obſerved, that the broker who had effected the policy, and in whoſe evidence another gained an intereſt, ſhould not, by his own act, (of afterwards ſubſcribing the policy) deprive that other of the benefit of his teſtimony.

A third exception is, that where a perſon who is tendered as a witneſs, does every thing in his power to get rid of any objection to his teſtimony, it ſhall not be competent to the other party, by an obſtinate refuſal, to prevent his being examined. In *Goodtitle* v. *Welford*, *Doug.* 139. the deviſee of a reverſionary intereſt ſurrendered to the heir at law, who conteſted the will, but the heir refuſed to accept the ſurrender, and it was held that, as the witneſs had parted with his intereſt, ſo far as depended upon him, third perſons had a right to his teſtimony, and the ſurrenderee ſhould not deprive them of it, by refuſing to accept the ſurrender.—So in *Bent* v. *Baker*, the broker had joined with the other underwriters in a bill in equity, for the purpoſe of avoiding the policy; but the defendant and witneſs offered to pay the aſſured the coſts of the

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ſuit in equity, and to procure the bill in equity to be diſmiſſed, as to them, at their own expence, which offer the plaintiffs would not accept; this was held ſufficient to remove any objection to his evidence, founded on the ſuit in equity. Mr. Juſtice *Buller*, ſtating the propoſition with which I have introduced this paragraph—In order to warrant the application of this principle, the nature of the refuſal muſt be attended to. If the witneſs has an intereſt which he agrees to relinquiſh in favour of the party, the party cannot, by his own refuſal, defeat the teſtimony; but, on the other hand, he can never be required to concur in relinquiſhing any claim, or intereſt of his own, againſt the witneſs.

Where a witneſs has an equal intereſt in the deciſion either way, he may be examined. In *Buckland* v. *Tankard*, 5 *T. R.* 578, the acceptor of a bill called one *Gregſon* to prove that the plaintiff had no property in the bill, but that it belonged to the witneſs, and had been merely delivered to the plaintiff to obtain payment for him; which evidence was diſallowed, on the ground that if the plaintiff ſhould ſucceed, the witneſs would be put to greater difficulties to get back the money, than if the plaintiff ſhould be foiled by means of his teſtimony. But in *Ilderton* v. *Atkinſon*, 7 *T. R.* 480, when the queſtion aroſe whether *Barber*, who received money from the defendant, was or was not intitled to do ſo as agent for the plaintiff; it was held that *Barber* was a competent witneſs, being anſwerable either to the plaintiff or the defendant, although it was objected that if the defendant recovered, the witneſs would be liable in addition to the coſts of that action. And in the ſubſequent caſe of *Birt* v. *Kerſhaw*, 2 *Eaſt*, 458, it was held that an indorſer of a bill was a competent witneſs, for the drawer to prove that he had received the money from him, and paid it to the indorſee, although it was admitted that if the plaintiff recovered, the witneſs would be anſwerable to the defendant for the coſts of the cauſe; and the authority of *Buckland* v. *Tankard*, was diſallowed.—There can certainly be no diſpute with reſpect to the principle, where the event is to the witneſs a matter of abſolute indifference; and it ſeems to be going too far to conſider the probability of a greater difficulty in making out the caſe on the one ſide than on the other, as a circumſtance which affects the intereſt; but I do not ſee how it is poſſible to regard a witneſs as indifferent who has a preponderance of intereſt on either ſide, or to conceive that the ſlighteſt poſſible intereſt on the one ſide, can either, in point of legal reaſoning, or in reſpect to the probable motives of conduct, be ſuffered to counterbalance the greateſt poſſible intereſt on the other; and if not, then the ſlighteſt exceſs is as much a real intereſt as if that exceſs

had been the only ſubject in diſpute. It is ſometimes ſaid that an intereſted witneſs is admiſſible in criminal proſecutions; but many caſes ſuppoſed to be founded upon this principle, in fact proceed upon a different ground. The admiſſibility of evidence in criminal caſes is a ſubject to which I ſhall preſently refer with more particularity.

Though an intereſt in the event of the cauſe is in general neceſſary to the diſqualification of a witneſs, and an intereſt in the queſtion propoſed is not ſufficient, it does not follow that a witneſs is neceſſarily incompetent who has an intereſt in the event of the ſuit, unleſs he has an intereſt in eſtabliſhing the truth of his anſwer to the queſtion propoſed. There are not many caſes to which this obſervation can apply, but the effect of it may be illuſtrated by an inſtance which I have heard ſtated, without oppoſition, in the court of King's Bench. Upon an indictment againſt a townſhip, or an individual, for not repairing a highway, an inhabitant of the pariſh at large is intereſted in eſtabliſhing the indictment, as he thereby exonerates himſelf; therefore he cannot prove the ſpecial obligation to repair, but he may prove the place in queſtion to be a common highway, for to that extent his teſtimony only induces a charge upon himſelf.

In *Fotheringham* v. *Greenwood*, *Str.* 129, it was held, that if a witneſs thinks himſelf intereſted in the queſtion, though in ſtrictneſs of law he is not, yet he ought not to be ſworn, and a caſe was cited where a perſon who owned himſelf to be under an honorary, but not a binding engagement, to pay the coſts, was held incompetent; which doctrine was admitted in *Trelawny* v. *Thomas*, 1 *H. Bl.* 303. I cannot, however, avoid entertaining a doubt on the rectitude of this opinion. It is agreed that a party in a cauſe has a right to the teſtimony of a witneſs to whom there is no legal exception. Whether there is an exception, founded upon an actual intereſt recognized by law, is a plain and palpable object of inquiry, but it is injurious that one man ſhould be prejudiced by the mere imagination of another; that his claim ſhould be repelled by the idea of an obligation in his favour, which obligation he will afterwards be unable to enforce.

A releaſe which deſtroys all legal intereſt is, as is perfectly familiar, ſufficient to induce the admiſſion of teſtimony, though the releaſe is executed even after the witneſs is called. Theſe releaſes are often given by perſons under an expectation that thoſe who have profited by their teſtimony will not withhold their ſhare of the advantage. An expectation of this kind is always open to obſervation, as it may influence the wiſhes or affect the credit, though

though it does not exclude the teſtimony of the perſon by whom it is entertained (*a*).

The intereſts of the huſband and wife are ſo identified in contemplation of the Engliſh law, that whatever exceptions, founded upon intereſt, can be taken to the evidence of the huſband, will be equally applicable to that of the wife.

And it is alſo a general rule, that the huſband and wife cannot, in either civil or criminal caſes, be allowed as witneſſes either for or againſt each other, a rule which is founded not merely upon the conſideration of intereſt, but upon a principle of public policy. Upon this principle it was ruled in an action brought by truſtees for goods which had been conveyed to them for the ſeparate uſe of the wife, and were taken in execution for the debt of the huſband, that the huſband could not be admitted as a witneſs to prove the identity of the goods. *Davis* v. *Dinwoody*, 4 *T. R.* 678.

This rule is ſubject to ſome exceptions in criminal caſes. In caſe of high treaſon, the allegiance to the ſovereign is conſidered as paramount to the obligations of marriage, and the rule does not attach. Where a woman is forcibly married ſhe is a witneſs to prove the fact, in an indictment againſt her huſband, founded upon *ſt.* 3 *Henry* 7. *c.* 2. Lady *Audley* was allowed as a witneſs to prove that her huſband aſſiſted in committing a rape upon her; but the authority of this caſe has been frequently diſputed. Mr. Juſtice *Buller* obſerves, that the wife is always permitted to ſwear the peace againſt her huſband, and her affidavit has been admitted to be read, on an application to the court of King's Bench, for an information againſt the huſband for an attempt to take her away after articles of ſeparation; and it would be ſtrange to permit her to be a witneſs to ground a proſecution upon, and not afterwards to be a witneſs at the trial.

But an application for articles of the peace is founded upon the neceſſity of immediate protection, it is a meaſure merely cautionary, and no legitimate inference can be drawn from the practice in ſuch a proceeding, to a common law queſtion of evidence. The circumſtance of admitting the oath of the wife as a ground for an information, does not induce a much ſtronger argument. Upon ſummary and interlocutory proceedings the repreſentation of parties is continually admitted, whoſe teſtimony would be unqueſtionably rejected upon a trial before a jury. A plaintiff is not only allowed to make an affidavit of a debt, in order to hold the defendant to bail, but the affidavit is in general (with what propriety it is not material for the preſent purpoſe to diſcuſs) concluſive, and

(*a*) The caſes which have been decided reſpecting the competence of witneſſes, are very well digeſted by Mr. Peake.

not ſubject to contradiction; yet the evidence of the plaintiff cannot be admitted to ſubſtantiate that debt upon the trial. The defendant, againſt whom an information is moved, may, by his own affidavit, contradict the charge imputed to him. It might be thought ſtrange that he ſhould be allowed to repel, by his own affidavit, the granting the information, and yet be precluded from giving his own evidence afterwards to contradict it; but it would produce very conſiderable ſurpriſe if any ſuch evidence was offered. Mr. *Leſſi* mentions the caſe of a criminal charge againſt a huſband, for a perſonal injury to his wife, at *Bury* Aſſizes, 1784, upon which the judge recommended, in his charge, that the bill ſhould not be found, if unſupported by any other evidence than that of the wife, ſince a cauſe unſuitable for the public ear would come to trial, with a legal neceſſity of the priſoner being diſcharged for want of evidence competent to go to the jury. But it muſt be admitted, that if the point were otherwiſe diſputable, the opinion expreſſed by a judge in his charge to a grand jury, would not have a very conſiderable influence in ſettling it. I believe, however, that the evidence of a wife againſt her huſband, upon a charge for perſonal ill-treatment, is in practice now admitted.

A caſe in which a wife was admitted to prove that a debt was due, not from the defendant in her cauſe, but from her huſband, is often cited, accompanied with the propoſition, that between other parties the wife may be admitted as a witneſs to charge her huſband. *Str.* 504. Certainly if the huſband had no intereſt in the event of the cauſe, there could not be any objection to the evidence of the wife.

There are ſeveral caſes in which perſons were not allowed to prove the fact of their being, or not being married. In one of them (*Dale* v. *Johnſon*, *Str.* 568,) the reporter not inaptly makes a query—for it is begging the queſtion which is to be tried. There certainly does appear an incongruity in holding that a perſon ſhall not be allowed to prove a fact, upon the exiſtence, or non-exiſtence of which, the competence, or incompetence to be examined depends; and the caſe is involved in the dilemma, that if the parties are married the ulterior conſequences attach without further queſtion; if they are not married there is no objection to the competence.

Where a man is indicted for polygamy, the firſt wife is not a lawful witneſs to ſupport the fact of her marriage, and conſequently the proſecution againſt her huſband; but the ſecond wife is a ſufficient witneſs to prove the ſecond marriage, which is merely a criminal act, and induces no relation between the parties.

The doctrine of excluſion has been extended furtheſt in the caſe of *The King* v. *the Inhabitants of Cliviger*, 2 *T. R.* 263, in which a woman

woman having been removed as the wife of *J. W.* the huſband, upon his examination, denied having been previouſly married to any other perſon; and it was held that another woman ſhould not be allowed to give evidence of her having been previouſly married to him. Mr. Juſtice *Aſhhurſt* ſaid, that the ground of the wife's incompetency ariſes from a principle of public policy, which does not permit huſband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to caſes where the huſband or wife are directly accuſed of any crime, but even in collateral cauſes, if their evidence tends that way, it ſhall not be admitted. Now here the wife was ſworn to contradict what her huſband had before ſworn, and to prove him guilty of perjury as well as bigamy, ſo that the tendency of her evidence was to charge him with two crimes. However, though what ſhe then ſwore could not be given in evidence on a ſubſequent trial for bigamy, yet her evidence might lead to a charge for that crime, and cauſe the huſband to be apprehended.—And Mr. Juſtice *Groſe*, the only other judge in court, concurring in that opinion, obſerved, that the true and beſt ground of objection was not that of intereſt, but was founded on the political inconvenience of cauſing diſſentions in families, between huſband and wife. Mr. *Chriſtian*, in his notes to *Blackſtone*, after mentioning the above determination, proceeds to obſerve that, "if this be true a plaintiff, or proſecutor, may have the benefit of the teſtimony of the one, and the defendant, or priſoner, cannot have the benefit of the teſtimony of the other, becauſe the evidence of the latter would tend to charge the former with perjury. Surely in ſuch caſes where the intereſts of ſtrangers are concerned, the furtherance of public juſtice is a conſideration far ſuperior to the policy of marriage, or the domeſtic ſtrifes of the parties."

In the caſe of *The King* v. *Frederick and Tracy*, *Str.* 1095, the defendants were indicted for a joint aſſault, and it was inſiſted to examine the wife of the defendant *Tracy* as a witneſs for the other defendant, but there having been material evidence given againſt the huſband, and it being a joint treſpaſs, and impoſſible to ſeparate the caſes of the two defendants, in the account to be given of the tranſaction, the Chief Juſtice refuſed to let her be examined.

The rule concerning criminal proceedings is ſtated by *Gilbert* as follows: "in all public proſecutions the party injured may be a witneſs, where there is only a fine to the King, and no private advantage to himſelf ariſing by ſuch a proſecution; but if there be any advantage of private benefit to accrue by the proſecution, the party is equally excluded as in a private action."

This exception of a private intereſt does not exclude the teſtimony of a perſon from whom goods are ſtolen, though by ſtatute he is entitled to a reſtitution in caſe of conviction; neither are perſons entitled to rewards for apprehending highwaymen, burglars, &c. thereby diſqualified from giving evidence. An informer entitled to the whole, or any part of a penalty, cannot be examined as a witneſs to ſupport the information; and many convictions before juſtices of the peace have been ſet aſide on account of this objection.

The connection of a private intereſt with a public proſecution has been formerly allowed as an objection in many caſes, which have ſince been over-ruled. For inſtance, a perſon from whom a note had been fraudulently obtained, was held by Lord Chief Juſtice *Holt*, to be an incompetent witneſs to ſupport an indictment for the fraud, for though the verdict upon the information could not be given in evidence in an action on the note, the Court were ſure to hear of it to influence the jury. *Rex.* v. *Whiting*, *Salk.* 283. There are alſo ſeveral caſes in which it has been held, that perjury could not be proved upon an indictment, by the evidence of the perſon againſt whom it was committed.

Alſo, that in an information upon the ſtatute of uſury, the party to the uſurious contract could not be a witneſs, becauſe that would be to avoid his own ſecurities.

But the authority of all thoſe caſes is now deſtroyed, and the ſubject was, after ſome other deciſions, contradictory to thoſe already ſtated, very fully inveſtigated by Lord *Mansfield*, in the caſe of *Abrahams* v. *Burn*, 4 *Bur.* 2251, in which a perſon who had borrowed and repaid money upon an uſurious contract, was held a competent witneſs in a penal action to prove the uſury; and it was laid down as an eſtabliſhed rule, that the queſtion in a criminal proſecution, being the ſame with a civil cauſe in which the witneſs was intereſted, went *generally* to the credit, unleſs the judgment in the proſecution where he was a witneſs, could be given in evidence in the cauſe where he was intereſted. It was alſo ſtated as eſtabliſhed, that where the matter was doubtful, the objection ſhould go to the credit, and not to the competence.

In that caſe the borrower had repaid the whole money, and there was no ſecurity or pledge outſtanding againſt him, which was partly relied upon in the deciſion; and ſome expreſſions fell from the Court, from which it might be inferred, that it would be a ſufficient objection if the cauſe turned upon points and tranſactions, which, if proved in another cauſe, would avoid the debt. A caſe which happened ſome time afterwards ſeems to admit the ſame principle—an uncertificated bankrupt was not allowed, as a witneſs,

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to ſupport a penal action for receiving uſurious intereſt from himſelf, not having repaid the money borrowed. *Maſters* v. *Drayton*, 2 *T.R.* 496. But this was prior to the full inveſtigation which the doctrine of competence received in the caſe of *Bent* v. *Baker*; and I have already had occaſion to allude to a ſubſequent deciſion, in which the contrary was expreſsly decided, upon the broad and intelligible principle, that the witneſs had not any intereſt in the event of the cauſe. *Smith* v. *Prager*, 7 *T. R.* 60 (*a*).

It may ſtill be queſtionable whether the party grieved can be a witneſs to prove perjury, upon the ſtatute 5 *Eliz. c.* 9, as by that ſtatute the party injured is intitled to 10*l.* and as the ſtatute gives the action to the party upon the offender being convicted, ſuch conviction tends directly to his intereſt, and muſt be given in evidence in the action, therefore the teſtimony ſeems inadmiſſible.

In *Howard* v. *Shipley*, 4 *Eaſt*, 180, it was held, that a perſon was a competent witneſs to prove bribery at an election, although a ſimilar action had been brought againſt himſelf, and he avowed the intention of availing himſelf of the indemnity given to a diſcoverer.

A perſon whoſe name is forged is ſtill conſidered incompetent to prove the forgery, unleſs he has a releaſe from thoſe who are intereſted in the validity of the inſtrument, as is evident from daily practice. An exception is ſtated in *Bull. N. P.* 289, where he is not directly intereſted in the queſtion, as in *Wells'* caſe, who was indicted for forging a receipt from *A.*—*A.* having recovered the money in an action againſt *Wells*, was admitted to prove the forgery.

In a caſe at the Old Bailey, *Sept.* 1792, the obligor in a bond being indicted for altering a receipt for intereſt, ſo as to make it appear a receipt for principal and intereſt, Mr. Baron *Hotham* held the obligee to be an incompetent witneſs, although he had obtained a verdict invalidating the receipt, as judgment had not been entered up. If a ſimilar point were again to ariſe, it might not be unimportant to conſider, how the witneſs, in ſuch a caſe, can derive any benefit from the conviction of the offender, as the goods of ſuch offender being forfeited to the crown, the witneſs is thereby deprived of the fruit of his verdict, and loſes all chance of ſatisfaction for his demand; and it may perhaps be found, that the inadmiſſibility of ſuch evidence has been taken for granted too generally, without adverting to the difference of conſequences which reſult from its being received between one caſe and another.

(*a*) In the *King* v. *Boſton*, 4 *Eaſt*, 572, the defendant, in a ſuit in equity, put in an anſwer, upon which an iſſue was directed, which came on to be tried at the ſame aſſizes, with an indictment for perjury in the anſwer. The indictment came on firſt for trial, and it was ruled, that the plaintiff in equity was a competent witneſs to prove the perjury.

I have heard a learned judge aſſign a reaſon for not admitting a perſon, whoſe name is forged to an inſtrument, purporting to ſubject him to an obligation, viz. that though the crown acquires a right, by forfeiture, to the goods of the offender, it may not be allowed to ſet up ſuch a right in reſpect of the particular obligation, which, by the ſame record that is neceſſary to the title, is found to be a forgery.

There are ſome other points reſpecting the teſtimony of witneſſes, which it may be at preſent proper to advert to.

A counſel or attorney cannot be allowed to give evidence reſpecting matters which have been diſcloſed to them confidentially in thoſe capacities, by their clients: but with reſpect to matters of fact which are in their own knowledge, they are equally admiſſible, and are equally compellable to give their evidence, as other perſons.

In the caſe of *The King* v. *Watkinſon*, *Str.* 1112, it was ruled, that an attorney preſent at the putting in an anſwer by his client, was not compellable to prove that fact on an indictment for perjury againſt the client; but the reporter makes a quære, for this was a fact in his own knowledge, and no matter of ſecrecy committed to him by his client. An attorney is not compellable, upon a *ſubpœna duces tecum*, to produce papers with which he is intruſted by his client, as evidence againt his client, but ought upon receiving the ſubpœna, to deliver them up to him. *Rex* v. *Dixon*, 3 *Bur.* 1686. But an attorney having atteſted a deed, and refuſing to give evidence thereof, was puniſhed by attachment. *Doe ex dem. Jupp* v. *Andrews*, *Cowp.* 845. An interpreter between a party and his attorney, was held, by Lord *Kenyon*, to ſtand in the ſituation of the attorney himſelf, in Madam *du Barre*'s caſe, cited 4 *T. R.* 756. A perſon by profeſſion an attorney, and conſulted confidentially, but not employed as an attorney in any ſuit, is not within the exemption. *Wilſon* v. *Raſtall*, 4 *T. R.* 753. Mr. Juſtice *Buller* ſaid, "This doctrine of privilege was fully diſcuſſed in a caſe before Lord *Hardwicke*. The privilege is confined to the caſes of counſel, ſolicitor, and attorney; but in order to raiſe the privilege, it muſt be proved that the information which the adverſe party wiſhes to have, was communicated to the witneſs in one of thoſe characters; for if he be employed merely as a ſteward, he may be examined. It is indeed hard, in many caſes, to compel a friend to diſcloſe a confidential converſation, and I ſhould be glad if by any law ſuch evidence could be excluded. It is a ſubject of juſt indignation when perſons are anxious to reveal what has been communicated to them in a confidential manner; and in a caſe mentioned

mentioned in the argument where *Reynolds*, who had formerly been the attorney of Mr. *Petrie*, but who was diſmiſſed before the trial of the cauſe, wiſhed to give evidence of what he knew relative to the ſubject, while he was concerned as the attorney; I ſtrongly animadverted on his conduct, and would not ſuffer him to be examined; he had acquired his information during the time he acted as attorney, and I thought that the privilege of not being examined to ſuch points was the privilege of the party, and not of the attorney, and that the privilege never ceaſed at any period of time. In ſuch a caſe it is not ſufficient to ſay that the cauſe is at an end, the mouth of ſuch a perſon is ſhut for ever. I take the diſtinction to be now well ſettled, that the privilege extends to thoſe three enumerated caſes at all times, but that it is confined to thoſe three caſes only. There are caſes to which it is much to be lamented that the law of privilege is not extended; thoſe in which medical perſons are obliged to diſcloſe the information which they acquire in attending in their profeſſional characters. This point was very much conſidered in the Ducheſs of *Kingſton*'s caſe, where Sir *Ceſar Hawkins*, who had attended the Ducheſs as a medical perſon, made the objection himſelf, but was over-ruled, and compelled to give evidence againſt the priſoner." After an interlocutory judgment was ſigned, and a writ of inquiry executed, in an action at the ſuit of an indorſee of a promiſſory note, and the cauſe compromiſed, the plaintiff told his attorney he was glad it was ſettled, as he had only given ten pounds for the note, and knew it was a lottery tranſaction; the Court held that this caſe was not within the rule, that the difference was, whether the communication was made by the client to his attorney in confidence, as inſtructions for conducting his cauſe, or a mere *gratis dictum*. *Cobden* v. *Kendrick*, 4 *T. R.* 431. The caſe mentioned in *Bull. N. P.* 284, where a defendant pleaded to debt upon bond, the 5 and 6 *Edw.* 6, againſt buying and ſelling offices, and upon the trial *A.* was produced as a witneſs to give an account upon what occaſion the bond was given, and Lord Chief Juſtice *Holt* refuſed to admit him, becauſe he was privately intruſted to make the bargain by both parties, and to keep it ſecret—ſeems not to be law, according to the opinion in *Wilſon* v. *Raſtall*.

It alſo ſeems to be a neceſſary conſequence of the deciſion in *Wilſon* v. *Raſtall*, that the privilege of ſecrecy does not extend to any communications made in the buſineſs of conveyancing, although the perſon employed therein may be an attorney; for it is not a caſe in which an attorney has any ſpecial privilege, or recognized character, but he is merely reſorted to as a perſon of ſkill in the buſineſs required.

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In *Walton* v. *Shelly*, 1 *T. R.* 296, it was decided that a perſon who had given credit to a negotiable inſtrument, by putting his name upon it, could not afterwards be admitted as a witneſs of any facts to invalidate it; but that deciſion was over-ruled in *Jordaine* v. *Laſhbrooke*, 7 *T. R.* 601, in which it was decided that the indorſee of a bill dated at *Hamburgh*, for the purpoſe of evading the ſtamp duty, might be admitted as a witneſs to prove that it was drawn in *England*.

Lord *Manſfield*, in *Walton* v. *Shelly*, and Mr. Juſtice *Aſhhurſt*, who differed from the reſt of the court in *Jordaine* v. *Laſhbrooke*, relied in a great degree upon the maxim of the civil law, *nemo allegans ſuam turpitudinem eſt audiendus*. I conceive, however, the real principle of the maxim is no more than that a perſon ſhall not found any claim, or defence, upon his own iniquity, and that it has no relation to the caſe of a witneſs, and, in fact, it muſt in general be very difficult to conceive that a perſon would be inclined, as a witneſs, to ſtate his own miſconduct, in oppoſition to the truth, unleſs he appeared to have ſome motive for doing ſo, connected with the event of the cauſe.

Mr. Juſtice *Lawrence*, in *Jordaine* v. *Laſhbrooke*, ſaid, that as no earlier determination than *Walton* v. *Shelly* was to be found in ſupport of the point which was there decided, it muſt depend upon its being ſupported by the general principles and rules of law, applicable to the admiſſibility of witneſſes. "Now" (he ſaid) "I find no rule leſs comprehenſive than this, that all perſons are admiſſible witneſſes who have the uſe of their reaſon, and ſuch religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and are not influenced by intereſt. What credit will be due to them muſt depend on a great variety of circumſtances, and muſt be decided on by the jury; and I am not aware of any caſe ſolemnly decided, excepting that of *Walton* v. *Shelly*, in which a witneſs has been rejected as incompetent, but upon the ground of ſome objection which may be claſſed under one or other of theſe heads. Under none of theſe claſſes does the witneſs in this caſe fall, and the conſtant practice of examining accomplices ſhews, that the mere circumſtance of a man's repreſenting himſelf as having done things inconſiſtent with common honeſty, is not ſufficient to reject his teſtimony, however it may weaken and impeach it."

It is ſaid that parents ſhall not be received as witneſſes to baſtardize their own iſſue: the proper application and extent of this rule, are ſhewn by Lord *Manſfield* in the caſe of *Goodright* v. *Moſs*, *Cowp.* 591. cited in the preceding ſection, "As to the time of birth the father and mother are the moſt proper witneſſes to prove it;

it; but it is a rule, founded in decency, morality and policy, that they ſhall not be permitted to ſay, after marriage, that they have had no connection, and that the iſſue is ſpurious." In the caſe of *The King* v. *The Inhabitants of Bromley*, 6 *T. R.* 330, it was ruled that perſons who have cohabited as huſband and wife, are competent to prove that they were not married, and that their children are illegitimate; but it was ſaid by the Court, that ſuch teſtimony is open to great obſervation.

SECTION XIII.

Of Confeſſion.

It certainly is very reaſonable that a party who, by his own act, voluntarily diſpenſes with any proof being made of a fact by which he may be affected, ſhould be ſubject to the ſame conſequences as if ſuch fact had been actually eſtabliſhed by evidence; but the reality of the acknowledgment from which any ſuch concluſion may be drawn, and the extent to which the inference from it ought to be applied, are ſubjects which may deſerve very conſiderable deliberation.

It has often appeared to me, that a diſtinction is not ſufficiently made between the actually admitting a fact, and the declining to conteſt it; that the one ſhould be regarded as effective, not only directly and with reſpect to its immediate object, but alſo that until it is ſhewn to have been founded upon ſome miſtaken ſuppoſition, the fact which it imports ſhould alſo be taken as eſtabliſhed, with reſpect to all its collateral and incidental conſequences; while the effects of the other ſhould be confined to the immediate ſubject of it, and that the party who, from a conſideration of the immateriality of the intereſt involved in any queſtion, compared with the expence and riſque, declines conteſting it, ſhould only be bound by his election ſo far as it goes, without being prejudiced in reſpect to any other purpoſe. The diſtinction between actually admitting a fact, and declining to conteſt it, may be partly illuſtrated by the caſe of *The Queen* v. *Templeman*, 1 *Salk.* 55. in which *Holt*, Chief Juſtice, took a difference between a man confeſſing an indictment, and his being found guilty; that in the firſt caſe a man may produce affidavits to prove *ſon aſſault* upon the proſecutor, in mitigation of the fine, otherwiſe where the defendant is found guilty, for the entry upon a confeſſion is only *non vult contendere cum Domino Rege, & ponit ſe in gratiam curiæ.* And in every other caſe I ſhould conceive it reaſonable, that a formal act of confeſſion ſhould not be carried beyond its immediate purpoſe, ſo as to preclude, in other reſpects, the application

plication of that juſtice which would reſult from the real manifeſtation of the truth. But it has generally ſeemed to me, that there is a very ſtrong diſpoſition to hold parties to the conſequences of every thing which can, even by implication, be regarded as an acknowledgment; without giving an adequate attention to the nature of the act from which ſuch acknowledgment is inferred, to the difference between conſciouſneſs and inadvertence, between acquieſcence on the ground of immateriality or inſignificance, and aſſent induced by a certain perſuaſion of the truth.

There is very great utility and benefit in the practice which allows a perſon, againſt whom an action is commenced, to pay a certain ſum of money into court, ſo that the plaintiff, if he proceeds afterwards, may proceed at the ſame peril, in caſe he cannot eſtabliſh any claim beyond the amount of the money which he has ſo paid, as he would have done, if he had had no claim at all; but I think this benefit would be extended by giving effect to the diſtinction that has been above alluded to, and where there may be two queſtions, the one trifling and inſignificant, the other material and important, which, upon examination, may eventually be found reducible to the ſame principle, it would be deſirable to allow a party to relieve himſelf from the hazard of coſts with reſpect to the one, without his being thereby concluded with reſpect to all the inferences which may be referable to the other; but the contrary doctrine appears to be eſtabliſhed. In *Yate* v. *Willan*, 2 *Eaſt*, 128, an action was brought againſt a carrier for not delivering goods of a greater value than 5*l.* according to an alledged agreement; the defendant had given notice that he would not be anſwerable for goods above the value of 5*l.* unleſs ſpecially entered; and it appeared that by the circumſtances of the caſe, he was not liable to the action, and that the notice excuſed him from being anſwerable even to the amount of the 5*l.* but the deciſion was, that the payment of that ſum into court, was an acknowledgment of the contract as ſtated; and therefore, as he was liable for the whole, if he was liable for any part, his acknowledgment (which, according to the principle above alluded to, might have been only conſidered as a waiver of his defence *pro tanto*) of any part was not only an acknowledgment, but a concluſive acknowledgment and eſtoppel for the whole. Without examining how far this deciſion was abſolutely neceſſary, in conſequence of the previous ſtate of practice, I may venture to ſuggeſt, that it is in the power of courts to correct the inconvenience alluded to, without overturning the precedent; by granting rules for defendants to pay money into court *without prejudice*; and I think it would certainly be deſirable to allow a party,

party, as much as poſſible, to reſtrain and limit the ground of diſpute, without ſubjecting him to demands for which he is really not anſwerable by doing ſo.

A judgment by default, or upon demurrer, is alſo conſidered as amounting to an admiſſion of the facts ſtated in the declaration; and the effect of ſuch admiſſion ſeems to be ſometimes carried further than the rules of legitimate reaſoning will fairly warrant. Upon ſuch a judgment the plaintiff is, without giving any evidence, intitled to damages; but the damages are in general only nominal, unleſs actual evidence is given of the particular right upon which the claim is founded: but when evidence is given, it ſhould appear to be open to every inquiry, with reſpect to the facts which it purports to eſtabliſh, ſince the acknowledgment is only of a right of action in general, and not of a right in reſpect to thoſe particular facts ſo adduced in evidence. The caſe of *De Gaillon* v. *L'Aigle*, 1 *Boſ. & Pul.* 368, has always appeared to me, upon this principle, rather incorrect. In that caſe the defendant pleaded coverture, to which there was a replication alleging circumſtances to render her perſonally liable; which replication, upon demurrer, was allowed to be good, and judgment was given for the plaintiff. Upon the execution of the writ of inquiry, the defendant gave evidence, that in the particular tranſaction brought forward, ſhe had only acted as agent for her huſband; and the jury being of that opinion, gave a verdict for only nominal damages: but a new inquiry was awarded, as the court were of opinion that the evidence ought not to have been admitted, and that the only queſtion to be decided by the jury was the amount of the debt, and that the queſtion whether *the debt* were contracted by the defendant as agent for her huſband, or in her ſeparate capacity, muſt be taken to be determined by the record.—Now I apprehend that a judgment by demurrer cannot fairly be carried further, in effect, than a judgment by default, except as to the eſtabliſhment of the point of law. By the judgment on the demurrer the court had decided, that ſuch facts as were ſtated in the replication, were a ſufficient anſwer to the defence alleged by the plea; but whether any ſuch facts did, or did not exiſt, was no further decided, than as a demurrer is technically a confeſſion of the exiſtence of ſome cauſe of action, upon which, as upon a judgment by default, the plaintiff, without any evidence, recovers nominal damages; but when actual evidence is introduced to raiſe thoſe damages to a greater amount, there would be a terrible perverſion of judgment, if the particular facts ſo adduced, were not open to examination: a perſon who demurred, or ſuffered judgment by default, having only in contemplation a debt of 40*s.* might be charged with a claim for 40,000*l.* which

he had never heard of; or with which he had only been incidentally connected. Wherever particular evidence is introduced to ſupport a claim on the one hand, that evidence ought, according to the principles of juſtice, to be open to examination and contradiction on the other (*a*).

I do

(*a*) At the time of writing ſome of the preceding obſervations, I had in contemplation a caſe of *Chambers* v. *Marſhall*, then depending upon a motion for a new trial in the Court of Common Pleas of Lancaſter, and ſince determined in a manner contrary to my wiſhes and expectations.

Eight defendants were ſued upon a demand for ſeveral hundred pounds, and pleaded in abatement, that the promiſes were made jointly with a great many other perſons. The fact was, that they were a committee appointed by the aſſociation of ſeveral friendly ſocieties, for the purchaſe of proviſions. From the multiplicity of names inſerted in the plea, it was impoſſible to ſubſtantiate it by evidence; but the real fact was, that the defendants were themſelves not liable, the contract having been made before they were conpected with the inſtitution. It was however held, that they were precluded by their plea, from conteſting the particular demand ſet up in evidence by the plaintiffs, in any other manner than by ſhewing the joint liability of the other perſons named. Suppoſing that they could have ſhewn the exiſtence of ſome other contract, made in conjunction with thoſe perſons with the plaintiff, I ſuppoſe that it would not have been held that they could be fixed with any other debt, which in fact they did not owe. But admitting for a moment, that before any evidence was given for the plaintiff, he would be intitled to a verdict unleſs ſome evidence was given by the defendant, to ſhew the exiſtence of ſome joint contract with the other perſons named; the queſtion is, whether any actual evidence given by the plaintiff, to intitle himſelf to more than nominal damages, is not fully open to examination and contradiction, it being perfectly evident that the ſuppoſed admiſſion on the record, if there really is any ſuch, is confined to a general cauſe of action, and has no reference to any particular facts which witneſſes may be adduced to prove. The deciſions in that court take place at the chambers in town, of the judges appointed for the northern circuit. I had not an opportunity of attending the argument, but the following unſucceſsful obſervations were, upon ſubmitting the motion for a new trial to the judge, who tried the cauſe, offered to him in writing with perfect ſincerity, and with as much conviction of their accuracy, as the ſituation and prejudices of an advocate can ever allow to be entertained. "In caſe it ſhould be held that the plaintiff was intitled to a verdict, without any evidence being given on either ſide, it is ſubmitted that an inquiry into the reality of the particular debt, attempted to be proved on the part of the plaintiff, was relevant and material with reſpect to the amount of damages. For otherwiſe the damages muſt either be nominal, or they muſt be for the amount ſtated in the declaration; or they muſt be entered according to the ſuggeſtion of the plaintiffs. Either of the two laſt ſtandards cannot be contended for; the damages then muſt be either nominal, or they muſt be the ſubject of inveſtigation; and if they are the ſubject of inveſtigation, they muſt be equally ſo to the plaintiff and the defendants, otherwiſe it would be competent, (as in fact was done in the particular caſe,) to fix them to an indefinite extent with reſpect to tranſactions which they had never any connection with, or with reſpect to debts which they had fully ſatisfied forty years before. The evidence offered by the plaintiff is relevant or irrelevant; if relevant, it is open to inquiry and contradiction; if irrelevant, it muſt be taken as if no ſuch evidence had been given. If the defendants muſt in point of form be taken to have admitted a cauſe of action within the terms of the declaration, as in caſe of a judgment by default, or upon a plea of *plene adminiſtravit*, it does not follow, that they therefore admit every particular cauſe of action within the ſcope of the declaration, which, contrary to the actual truth of the caſe, is aſſerted or attempted to be proved on the part of the plaintiffs.—If in other parts of the work I may be deemed to have taken too great a liberty, in oppoſing my own ſuggeſtions to the

I do not by any means impeach the caſes where the judgment is upon a promiſſory note, and it is held unneceſſary to prove the ſignature of it, for in thoſe caſes the legal confeſſion may be fairly held to extend to the exiſtence of the contract declared upon. My obſervations apply not to caſes in which the nature of the procedure renders evidence unneceſſary; but to thoſe in which the queſtion under conſideration relates to the effect of evidence actually produced; to caſes which cannot be ſupported without tending to the concluſion, that although ſome evidence is neceſſary to ſupport the particular demand contended for, yet if any evidence is given, it muſt be abſolutely deciſive whether the facts imported by it are correct or erroneous, unanſwerable or capable of explanation, true or falſe.

With reſpect to extra-judicial acknowledgments, great caution is requiſite in preventing their being carried further than their actual intent. The impreſſion, which the party ſuppoſed to have made the acknowledgment intended to convey, ought to be ſtrictly attended to; a critical catching commentary upon accidental expreſſions ought to be carefully avoided; the evidence by which the acknowledgment is ſupported is often very ſuſpicious, as I have had occaſion more particularly to obſerve in a former ſection, and ſhould be very ſcrupulouſly examined: the mere circumſtance of not denying a charge may make certain circumſtances very reaſonably give the ſame impreſſion as the actual admiſſion of it; but this is by no means univerſal, and the nature and weight of the circumſtances, and the motives for ſilence or denial, ought to be fully attended to. Much care ought eſpecially to be taken in preventing any expreſſions being regarded as an acknowledgment, which were only uſed as a propoſal for accommodation. When it appears that parties have met for the purpoſe of compromiſe, the evidence of any offer of accommodation is very properly excluded; the danger conſiſts in withdrawing from obſervation the real nature of the converſation, or tranſaction, in which the ſuppoſed acknowledgment is alleged to have taken place.

An actual payment is certainly the moſt unequivocal mark of

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the dictates of judicial authority, where my only poſſible motive was an unbiaſſed opinion upon the truth and juſtice of the ſubject, I ſhould be more juſtly open to a ſimilar accuſation when my retaining ſentiments advanced in the behalf of a client might lead to the imputation of pertinacity. I was not concerned in adviſing the mode of defence; but, apart from all immediate connection with the cauſe, I cannot but regret that, by the laws of *England*, eight men have the proſpect of ſpending their lives in gaol, on account of a debt which they never had any thing to do with, merely becauſe they had alleged, that if they owed any thing at all, they owed it in conjunction with other perſons.

acknowledging the juſtice of a demand; but ſuch a payment is ſubject to repetition, when it appears to have been made by miſtake; and the recovery of money ſo paid is one of the moſt ordinary grounds of the common action, for money had and received. In *Malcolm* v. *Fullarton*, 2 *T. R.* 645, it was ruled, that arbitrators were warranted in awarding a part of a ſum of money, which had been paid by the defendant to the plaintiffs, (the aſſignees of a bankrupt,) to be repaid. Mr. J. *Buller* ſaid, he was convinced that the defendant was not bound by the payment, it having been made by miſtake; the only payment (he proceeded) by which a party is bound, is that which is made into court, under a rule of court; that is a payment on record, and the party can never recover it back again, (*a*) though it afterwards appear that he paid it wrongfully; but that does not extend to payments between party and party.—If the actual payment, which is the ſtrongeſt mode of acknowledgment, can be defeated, by ſhewing that it originated in miſtake, it muſt follow *a fortiori* that any weaker kind of acknowledgment cannot properly have a more concluſive operation.

But it is obſerved by *Pothier*, that a confeſſion can only be avoided by ſhewing that it was made under a miſtake of fact, and that it is not ſufficient to allege a miſtake of law.

In a former publication I have had occaſion to advert to the queſtions, whether a perſon who had paid money merely under a miſtaken notion of legal obligation, was entitled to repetition; and alſo whether a perſon who promiſed to ſatisfy a claim, knowing the facts by which he was legally exonerated from it, but not knowing their legal conſequences, incurred an obligation by doing ſo. My concluſions upon thoſe two points having been contradicted by ſubſequent deciſions, I was induced very particularly to reſume the conſideration of them, and having met with the diſcuſſion of the general ſubject of Miſtakes of Law, by *D'Agueſſeau*, I had propoſed to offer the tranſlation of that piece, together with my own obſervations upon the particular ſubject, accompanied with ſome general reflections reſpecting the grounds of legal reaſoning and determination, as a detached publication, to which intention I made ſome alluſion in a note to page 306 of the preceding volume. It has ſince occurred to me, that I might, without impropriety, include theſe articles in the preſent Appendix, and they are accordingly ſubjoined in a following number.

With reſpect to the preſent ſubject, of a confeſſion made

(*a*) This obſervation does not at all affect the queſtion before adverted to, with reſpect to the payment of money into court operating as a confeſſion, beyond the amount actually paid.

under

under the miſtaken idea of legal obligation, I certainly adhere to the ſentiments which I have expreſſed in the eſſay alluded to; and I think that the principle which militates againſt inducing any prejudice, from a mere miſtake of law, applies more forcibly to a bare confeſſion, than to any other ſubject.

A ſum total cannot, according to any fair principles of reaſoning, be regarded as more than the particular items of which it is compoſed; and, therefore, when a perſon acknowledges generally the exiſtence of an obligation, and it manifeſtly appears that his only intention was to acknowledge the exiſtence of certain particular facts, and a certain legal concluſion as reſulting from thoſe facts, the caſe ſhould be conſidered preciſely in the ſame manner as if he had made the acknowledgment diſtributively; ſtating ſeparately the facts, and the legal opinion with reſpect to them. If the facts alone would not be ſufficient to induce an obligation, and the obligation reſulted from the mere expreſſion of an erroneous opinion with reſpect to the law; it would alſo be ſufficient to prove, by other teſtimony, the exiſtence of the facts, and to confine the evidence of confeſſion ſolely to the opinion expreſſed upon the point of law; and thereby to conclude a perſon by every erroneous legal opinion which he had ever entertained. I ſuppoſe it will not be ſeriouſly contended, that in either of theſe two latter caſes the obligation would attach; and the queſtion in diſcuſſion aſſumes and ſuppoſes the fact to be ſufficiently aſcertained, that what was expreſſed generally and conjunctively in the firſt caſe, proceeded from preciſely the intention, as what is expreſſed diſtributively and particularly in the ſecond. It will not be ſufficient to object to this courſe of reaſoning, as bearing the appearance of ſubtlety, unleſs it can be alſo ſhewn that the analyſis is not fairly conducted; and if what is to be regarded as ſubtlety of reaſoning is to be excluded, the right courſe will not be to do the thing by halves, but to aſk, what is the plain deciſion of common juſtice and common honeſty, leaving all artificial reaſonings out of the queſtion; and to conſider whether one man's ignorance of the law is a ſufficient ground for ſubjecting him to a prejudice, and entitling another, at his expence, to an adventitious benefit? It certainly is very difficult to reconcile the mind to the idea, that a miſtaken notion of the law is alone, and independently of all conſideration of particular circumſtances, (and it muſt be remembered that the argument is at preſent wholly upon the general propoſition,) an adequate cauſe of legal obligation.

There are ſeveral caſes in which the Engliſh law acts upon the principle, that an error of law cannot induce any legal conſequences. In the caſe of Lord *Griffin*, cited in *Wilkes*'s caſe, 4

Burr. 2551, the Attorney General came into court to confeſs the errors aſſigned in a judgment of outlawry, and to conſent to the reverſal. The Court told him his confeſſing an error in law would not do; they muſt judge it to be an error, and their judgment would be a precedent. In the cauſe of *Cox* v. *Parry*, 1 *T. R.* 464. an inſurance was made intended to cover certain goods of *A.*, and other goods of *B.*; the inſurance as to the goods of *A.* was void, his name not being inſerted in the policy, as was required by an act then exiſting; the defendant paid into court ſufficient to cover the loſs upon the goods of *B.*; and it was conſidered how far that could amount to an admiſſion with reſpect to the goods of *A.* The ſhort anſwer might have been given, that the payment into court admitted the general validity of the contract, but merely confined the application of it to that ſubject, with reſpect to which it was really obligatory; but the deciſion was upon the point, that paying money into court was an admiſſion with reſpect to the ſum paid, but no more. But in *Yate* v. *Willan*, above alluded to, Mr. Juſtice *Lawrence*, referring to the caſe of *Cox* v. *Parry*, ſaid that it amounted to no more than this: that if the contract declared upon be illegal, the defendant ſhall not give it effect by his admiſſion, becauſe no admiſſion of the parties can conclude the court, to make them give effect to an illegal contract.——Now the illegality, in the caſe referred to, was nothing of a criminal nature, with reſpect to which the court, from a diſapprobation of the object, refuſes its aſſiſtance to either party; all that could be poſſibly meant to be referred to by the imputation of illegality, was the mere want of circumſtances ſufficient to induce a valid legal obligation, and if the general ſentiment of the learned judge is, as I conceive, correct, it follows that an admiſſion of obligation which does not previouſly exiſt, has not the effect of inducing any. Upon judgment by default, a defendant is intitled to the ſame exceptions as upon general *demurrer*, the defendant being bound by his ſuppoſed confeſſion with reſpect to the fact, but not with reſpect to the law.

The conſideration of the general queſtion, how far a perſon is bound by his confeſſion ariſing from a miſtake of law, is wholly unaffected by any queſtions reſpecting the proof by which any miſtake may be eſtabliſhed; and which fact, like every other, muſt be ſuppoſed to be aſcertained or agreed before the queſtion of law can ariſe. The confeſſion itſelf, properly ſpeaking, ought only to be regarded as *primâ facie* evidence of the exiſtence of facts, ſufficient to induce the obligation which it imports, and as forming a preſumption open to explanation and contradiction.

I do not by any means offer to impeach the doctrine, that a perſon

ſon ſhall not diſavow a contract which he has entered into, on the pretence of having been ignorant of the legal conſequences attached to it. There his intention of entering into the definite contract is complete, and that intention includes the legal conſequences, whether known or otherwiſe; in the caſe of a confeſſion there is no intention of contracting any new obligation, but merely the expreſſion of an erroneous opinion, with reſpect to an obligation ſuppoſed already to exiſt; and which, if it does not exiſt, there is no adequate reaſon to create. In the firſt caſe, the party with whom the contract is made, might be ſubjected to prejudice if the obligation was not ſupported; for he had a right to rely upon the conſent of the other party, to aſſume all the legal obligations reſulting from the nature of the contract, and his own conſent was purchaſed upon the faith of that reliance. In the ſecond caſe, the party claiming the benefit of the acknowledgment, is merely contending for a contingent advantage, for which he has not given any conſideration whatever.

In the ſection upon hearſay evidence, I adverted to the queſtion, of the confeſſion of an agent being admitted as evidence againſt his principal, and ſtated my reaſons for conceiving that it could not be allowed. There is one caſe in which the declaration of a wife, that ſhe had agreed to pay 5s. a-week for nurſing a child, was received againſt the huſband, Lord Chief Juſtice *Pratt* obſerving, that matters of this kind were generally under the direction of the wife, *Anon*, *Str.* 527.; but this ſeems to be a mere anomalous deciſion at *Niſi Prius*, which ought not to have any effect in oppoſition to the general principle, which is clearly eſtabliſhed, that a wife's declarations cannot be admitted againſt her huſband; which has been carried ſo far, as even to exclude the declarations of the wife ſuing as executrix. *Alban* v. *Prichett*, 6 *T. R.* 680 (*a*). It has been held that the

(*b*) The caſe of *Aviſon* v. Lord *Kinnaird*, referred to in the ſection on *Hearſay Evidence*, is now reported, 6 *Eaſt*, 188. The particular evidence objected to was, that the plaintiff's wife, being ill in bed, mentioned *that ſhe had been at Mancheſter the week before to inſure her life*; *that ſhe was very poorly when ſhe went, and not fit to go*: and the court ſeem to have conſidered it as a cotemporary declaration. The argument partly proceeded upon the ground of breach of confidence between huſband and wife, for which there was certainly no foundation. Another point which the court acted upon was, that the plaintiff examined a ſurgeon as to her appearance in point of health, on the day when the inſurance was effected; and he expreſſed a favourable opinion, principally from the anſwers ſhe gave to his inquiries; and it was held by the court that this evidence being given on the part of the plaintiff, let in the other evidence (ſuppoſing it originally inadmiſſible) on the part of the defendant. This point may require a great deal of conſideration, before the principle which it involves is adopted as a rule of law. 1ſt, If a witneſs on the one ſide ſtates any thing in his anſwer which is not properly evidence; there being nothing objec-

the admiſſions made by an under-ſheriff are evidence againſt his principal in an action for an eſcape, becauſe he is anſwerable for the acts of his under-ſheriff, and the latter gives bond to him for the due performance of his office. *Yabſley* v. *Doble*, 1 Lord *Raym.* 190. Theſe reaſons are not very ſatisfactory; for although a ſheriff is anſwerable for the acts of his under-ſheriff, it does not follow that the declaration of the under-ſheriff (except where it conſtitutes a part of the *res geſta*) is the proper evidence of thoſe acts, and the liability over is only an indirect and incidental conſequence, the primary object of the action being to charge the ſheriff perſonally, and his ſecurity for reimburſement may probably be defective. The argument would go to ſhew that all principals are bound by the admiſſions of the agents, againſt whom they have a remedy over.

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tionable or objected to in the queſtion, I cannot conceive that that is ſufficient to warrant evidence, which in its nature is illegal, being deliberately given on the other. 2d, The converſation ſpoken to by the ſurgeon was a cotemporary act, and the point which ſeems to be decided is, that the giving evidence of a cotemporary, explanatory declaration, conſtituting a part of the *res geſta* on the one ſide, would let in explanatory or hearſay evidence, given of the ſame tranſaction at a ſubſequent period by the other ſide, which certainly is very far from being a neceſſary concluſion.—Mr. Juſtice *Lawrence* ſaid, that if the evidence of what ſhe ſaid was ſtruck out of the queſtion, there would ſtill be abundant evidence to ſhew that the verdict was right. But I apprehend that if any inadmiſſible evidence is received, it is not ſufficient, to ſupport the verdict, to ſhew that there was other evidence ſufficient to warrant the jury on drawing the ſame concluſion. It certainly would be no anſwer if the objection was taken by the good, but almoſt obſolete, courſe of a bill of exceptions, a proceeding which is commonly declined partly from an apprehenſion of apparent diſreſpect, and partly from conſiderations of expence. The idea of diſreſpect is always diſavowed, and I believe upon a calculation of expence a ſecond trial at *Lancaſter* would at leaſt be equal to the moſt chargeable mode of making up the record. This caſe alſo inclines me to expreſs a wiſh, which I have very often entertained, that where a point of evidence is argued at *Niſi Prius*, the queſtion ſhall be previouſly put down in writing; and that a diſtinct note in writing ſhall alſo be made, at the time of the points which are ſubmitted to the jury. The ſlight loſs of time which would ariſe from writing the points, and reading them to the jury from the note, would in many caſes be very amply compenſated. The new trial in *Aviſon* v. Lord *Kinnaird*, was applied for, not only on the queſtion of evidence, but upon a ſuppoſed miſdirection of the judge, that if the jury thought that at the time of effecting the inſurance, the immoral habit of exceſſive drinking was ſo rooted as to endanger the life of the plaintiff's wife, by its probable continuance, and this was known to the plaintiff at the time, it would avoid the inſurance. But this ground was afterwards diſavowed and removed by the report.—I am ſure I ſhall not be ſuſpected of meaning to convey the ſlighteſt imputation of any other intention, than that of communicating the moſt full and faithful account of the trial; but having been preſent, and ſtruck with the circumſtance at the time, I can declare that if I have full and diſtinct recollection of any incident which has occurred in the courſe of my life, it is of a direction to the effect mentioned in the objection. To deſire a judge to take a particular note of a particular direction, has often a teazing and irritating effect, and may excite a reply of unintentional harſhneſs, but a general habit which ſhould effectually ſecure a perfect repreſentation, appearing before the court in bank of the incidents at the trial, would have a more beneficial influence on the adminiſtration of the law, than that rapidity of execution which is often regarded as the ſureſt teſt of excellence.

SECTION XIV.

Of Presumption.

The examination included in a former section, of the principles which regulate the burthen of proof, necessarily produced a reference to different cases of presumption; the proper effect of presumption being to consider the truth of a proposition, whether positive or negative, as sufficiently established until the contrary is shewn.

In some cases the mere want of a presumption on the one side is a sufficient presumption in favour of the other; for wherever the nature of a subject leaves it perfectly indifferent, whether a given fact does or does not exist, the party who founds his claim or his defence upon the existence of it, must remove that indifference, and the opposite party may rely upon the single argument, that nothing appears in opposition to him, and that *de non apparentibus & non existentibus eadem est ratio.*

Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true, the other cannot be false, as where connection is inferred from pregnancy, the term presumption cannot be legitimately applied: for the nature of presumption is, that it does not require to be substantiated, but that it may be defeated by positive contradiction, according to the maxim that *stabitur præsumptioni donec probetur in contrarium.* The distinction between presumption and proof is, that the one may be false, but until shewn to be so, must be regarded as true; that the other (the facts upon which it is founded being admitted) cannot be otherwise than true.

In some cases, the inference of one fact which is deduced from another, is so strong, or so completely established by legal authority, that although it may really not be true, no argument or evidence is admitted to the contrary. This is the subject which in the civil law is distinguished by the appellation of *præsumptio juris & de jure*, the nature of which is fully explained in the preceding treatise, and the principal subject to which it is applied is the force of a judicial determination, the facts imported by which are not open to contradiction, although they may be, and frequently are, in opposition to truth. The presumption that, when two married people cohabit together, and there is no personal incapacity, the issue of the wife are the issue of the husband,—the maxim, (when properly applied,) that the king can do no wrong—are also

alſo of this deſcription. Some preſumptions are allowed and acted upon, which are not really believed to have any foundation in truth, but are merely convenient fictions, introduced for advancing what are ſuppoſed to be the purpoſes of juſtice; ſuch are the preſumptions in favour of a right to lights, which have been enjoyed for twenty years, and other preſumptions, the offspring of modern practice, which were particularly adverted to in the preceding number: ſuch is the preſumption that a ſatisfied term has been ſurrendered, which is admitted to prevent an action of ejectment from being defeated by a formal objection. The mode and form in which theſe laſt preſumptions are introduced, are, by regarding them as an actual concluſion by the jury from the facts; but it is well known that ſuch facts are not ſuppoſed to have any real exiſtence. How far the ſpirit of invention in this reſpect will be carried, it is impoſſible to gueſs. In *Wilkinſon* v. *Payne*, 4 *T. R.* 468. the plaintiff brought an action on a promiſſory note given him, in conſideration of a ſuppoſed marriage with the defendant's daughter. The note was objected to, on the ground that the marriage was not legal, having been contracted by licenſe when the plaintiff was under age, and there being no perſon competent to conſent; it was alſo ſhewn that the marriage could not have been ſolemnized after he came of age, the wife being confined to her bed from that time until her death. The judge left it to the jury to preſume a ſubſequent legal marriage by banns; which they accordingly did. A new trial was applied for, but refuſed. Whether the court, in their refuſal, proceeded upon recognizing the propriety of the direction, upon the diſcretionary nature of their authority in the granting of new trials, or upon the ſufficiency of the actual marriage, (ſetting the preſumption out of the queſtion,) cannot be exactly aſcertained, each of theſe grounds having been adverted to; the firſt of them however was not directly and explicitly avowed. Nothing can be more clear, than that a jury, profeſſing to believe the truth of a ſubſequent regular marriage, profeſſed to believe that which it was impoſſible, according to the ordinary ſtructure of the underſtanding, that they could believe in point of fact. If ſuch marriage had taken place, the plaintiff muſt have known it, being himſelf a party; and it is beyond all imagination that, knowing it, he ſhould not have been in a condition to prove it. Lord *Kenyon* in that caſe alluded to another caſe before him, of *Standen* v. *Standen*, in which the jury preſumed a legal marriage, though there was ſtrong ſuſpicion that there was not time enough for the banns to have been publiſhed three times; but the real deciſion in *Standen* v. *Standen*

proceeded on the ground of diſcrediting the witneſs who ſwore to impeach his own marriage. The principle adopted in *Wilkinſon* v. *Payne* is certainly very dangerous in its tendency, as it goes to ſubvert the main foundations of the diſtinction between truth and falſehood. Many caſes muſt occur in the adminiſtration of juſtice, where the wiſhes of thoſe who are to decide muſt, from the nature of the circumſtances, be in oppoſition to the legal right; but if we once begin to ſhake the rule that the law is to command, and the judge to obey; if we once admit the propriety of profeſſing to believe, as true, what we are actually convinced is not ſo; nobody can ſay where the deviation will ſtop, and legal certainty will be ſacrificed at the ſhrine of judicial diſcretion.

The *Engliſh* law has ſeveral inſtances, eſtabliſhed by act of parliament, of the preſumptions of law (*juris*) mentioned by *Pothier*, (that is, preſumptions which the law poſitively requires to be made, but which are ſubject to contradiction by poſitive evidence,) principally in caſes of revenue and penal ſtatutes. If a queſtion ariſes, whether a duty has or has not been paid? whether a perſon has or has not a given qualification? it is generally required that the proof of payment or qualification ſhall be incumbent upon the party, who is ſubject to any penalty or forfeiture on the oppoſite ſuppoſition.

By an edict of *Henry* II. of *France*, made in the year 1556, cited *Domat*. b. iii. *Tit*. 6. it is enacted that, "If a woman has concealed her being with child, and is brought to bed privately, and without any witneſs, and it be found that the child never was chriſtened, nor had any public burying, ſhe ſhould be reputed to have murdered her child, and be puniſhed with death." Our ſtatute, 21 *James* I. c. 27. *anno* 1623, which provides that, "If any woman ſhould be delivered of any iſſue, which, being born alive, ſhould by the laws of this realm be a baſtard, and ſhe endeavour privately either by drowning, or ſecret burying thereof, or any other way, ſo to conceal the death thereof, that it may not come to light whether it were born alive or not, but be concealed; the mother ſhall ſuffer death as in caſe of murder, except ſhe can prove that the child was born dead," is ſo very ſimilar to the preceding edict, that it may reaſonably be ſuppoſed to have been ſuggeſted by it. This ſtatute, after reſting a long time, almoſt as a dead letter in the book, has been lately repealed, and a more humane diſpoſition has been ſubſtituted for it. The preſumption certainly is in its own nature too violent, as the ſenſe of ſhame, in caſe of a child being born dead, may be attended to without ſacrificing the duties of humanity.

The

The preſumptions of moſt frequent occurrence are thoſe in which, from certain eſtabliſhed facts, an inference is deduced that may or may not be true, but, the truth of which being much more comformable to probability than its falſehood, is regarded as ſufficiently proved, until the contrary is ſhewn. To induce this preſumption, the facts from which it is deduced ſhould be either directly eſtabliſhed, or themſelves deduced from other facts upon the ſame principle of inference, ſo that the ultimate preſumption may be connected, either mediately or immediately, with facts eſtabliſhed by proof; it being always a primary preſumption that poſitive teſtimony is to be regarded as true; unleſs there are ſpecial reaſons for diſcredit, or at leaſt for doubt.

The general principles upon this ſubject are very diſtinctly expreſſed by *Domat* as follows: "The certainty or uncertainty of preſumptions, and the effect which they may have to ſerve as proofs, depends on the certainty or uncertainty of the facts from which the preſumptions are gathered; and on the juſtneſs of the conſequences which are drawn from thoſe facts, to prove the facts which are in diſpute. And this depends upon the connection that there may be between the known facts and thoſe which are to be proved: thus one draws conſequences from cauſes to their effects, or from effects to their cauſes; thus we conclude the truth of a thing by its connection with another to which it is joined; thus when one thing is ſignified by another, we preſume the truth of that which is ſignified, by the certainty of that which ſignifies it; and it is out of theſe different principles that ſigns, conjectures, and preſumptions are formed, concerning which there can be no certain rule laid down; but in every caſe it will depend on the prudence of the judge, to diſcern whether the preſumption be well or ill grounded, and what effect it may have as a proof."

He further obſerves that, "every thing which happens naturally and commonly, is taken as true; and, on the contrary, what is neither natural or common will not paſs as truth, unleſs it be proved; and that from theſe principles it follows, that there are facts which paſs for true, although there be no proof of them, and that there are others which paſs for falſe, unleſs they are proved."

Among the more general caſes of preſumption are thoſe, that innocence and ſanity are to be preſumed, but that guilt, fraud, or inſanity, are to be proved; but as it very ſeldom occurs that theſe will admit of direct and poſitive proof, they are uſually eſtabliſhed by the proof of circumſtances, which, being inconſiſtent in their nature with the general and ordinary preſumption, induce the ſpecial and particular preſumption to the contrary.

Although

Although guilt is in general to be proved, and innocence to be preſumed; a matter which, abſtractedly taken, is unlawful, muſt, upon the general ſtatement, be taken to be criminal, and any particulars which diſtinguiſh and excuſe it ought to be ſpecially ſhewn. See *Rex* v. *Bear*, 2 *Salk.* 418. "In every charge of murder, *the fact of killing being firſt proved*, all the circumſtances of accident, neceſſity, or infirmity, are to be ſatisfactorily proved by the priſoner, unleſs they ariſe out of the evidence produced againſt him; for the law preſumeth the fact to have been founded in malice, until the contrary appear; and very right it is that the law ſhould ſo preſume. The defendant, in this inſtance, ſtandeth upon juſt the ſame footing that every other defendant doth, the matters tending to juſtify, excuſe, or alleviate, muſt appear in evidence before he can avail himſelf of them." *Foſter's Diſcourſe on Homicide.* So, where inſanity is once proved to exiſt, but a lucid interval is alleged to have prevailed at a particular period, then the burthen of proof attaches on the party alleging ſuch lucid interval, who muſt ſhew ſanity and competence at the period in queſtion. *Attorney General* v. *Panther*, 3 *Bro. Ch.* 25. cited *ante.*

Sometimes a preſumption from certain facts is allowed for general purpoſes, but is ſubject to particular exceptions. Thus, in reſpect to marriage, cohabition and general reputation are uſually regarded as ſufficient evidence, without any neceſſity for an actual marriage being proved; but an exception prevails in the caſes of actions for adultery, and indictments for polygamy.

Amongſt other general grounds of preſumption, things are held to be legally and properly in their exiſting ſtate, until the contrary is ſhewn. If a perſon is in poſſeſſion of property, the preſumption is that he is the rightful owner. It is alſo a preſumption that things continue in their exiſting ſtate, unleſs there is evidence of an alteration having taken place. Thus where the iſſue is upon the life or death of a perſon once ſhewn to have been living, the proof of the fact lies upon the party who aſſerts the death; for the preſumption is, that the party continues alive until the contrary be ſhewn. *Throgmorton*, v. *Walton*, 2 *Rol. Rep.* 416. *Wilſon* v. *Hodges*, 2 *Eaſt*, 312. But what evidence ſhall be deemed ſufficient to encounter that preſumption, is a different queſtion. It certainly need not be direct evidence, and it is ſufficient to ſhew circumſtances that rebut the general probability. In the caſe of a life inſurance, the death of the perſon inſured is ſufficiently proved, by ſhewing that he ſailed in a ſhip which has not been heard of for an unuſual time. *Patterſon* v. *Black*, *Park Inſ.* 433. The ſame principle is applied in the caſe of inſurance of a ſhip. *Green* v. *Brown*,

v. *Brown*, 2 *Str.* 1199. *Newby* v. *Read*, *Park* 63. Sometimes the weight of the evidence may be affected by the nature of the queſtion in diſpute. In *Rowe* v. *Haſland*, 1 *Black. Rep.* 404. Lord *Mansfield* ſaid, that in eſtabliſhing a title upon a pedigree, where it may be neceſſary to lay a branch of the family out of the caſe, it is ſufficient to ſhew that the perſon has not been heard of for many years, to put the oppoſite party upon the proof that he ſtill exiſts. Many perſons go to the *Eaſt* or *Weſt Indies*, and are never heard of again. What is done in ſuch a trial is no injury to the man or his iſſue, if he ſhould afterwards appear and claim the eſtate. In *Harwood* v. *Goodright*, *Cowp.* 86. it was found by ſpecial verdict, that a teſtator made his will, and gave the premiſes in queſtion to the plaintiff in error, and that he afterwards made another will different from the former, but in what particulars did not appear to the jury. The court decided that the deviſee under the firſt will was entitled againſt the heir at law. Lord *Mansfield* in delivering their opinion ſaid, "The duty of the court is to draw a concluſion of law, from the facts found by the jury; for the court cannot preſume any fact from the evidence ſtated; preſumption indeed is one ground of evidence, but the court cannot preſume any fact. The ground the defendant reſts upon is this, that it is uncertain whether the will be revoked or not, and where the heir at law claims, his title ſhall never be taken away by an uncertainty. But this is all a fallacy, for here the deviſee does not ſet up an uncertainty, but a clear title under the firſt will; and on the contrary, it is the heir at law who ſets up an uncertainty againſt her."

Sometimes an ordinary preſumption becomes an abſolute one, by excluding all the circumſtances which are inconſiſtent with the poſſibility of its truth. In caſe of filiation, the iſſue of the wife is preſumed to be the iſſue of the huſband; this preſumption may be repelled by poſitive evidence of incapacity, or non acceſs; but where neither of thoſe facts appear, and, *à fortiori*, where they are excluded by proof, the preſumption of parentage becomes, as before obſerved, a *præſumptio juris & de jure*, and no evidence in oppoſition to it can be received. See the pleading of *D'Agueſſeau*, upon this ſubject, *poſt.* No. 19.

In caſes of contract where no particular evidence appears to the contrary, the parties are preſumed to have contracted according to the general nature of the ſubject, and the local uſage, if there is any ſuch, reſpecting it. In caſe a perſon agrees to become tenant to another at an annual rent, without ſpecifying any particular term, the contract is, by operation of law, for a tenancy from

from year to year: therefore if there is evidence of the ſubſiſtence of a tenancy, but no evidence of the terms of it, ſuch a tenancy from year to year is preſumed, until the contrary be ſhewn; it is alſo preſumed that the parties contracted, ſubject to the general obligations reſulting from their reſpective characters. In caſe the commencement of the tenancy does not appear, and it is uſual in the country where it ſubſiſts for ſimilar tenancies to commence on a particular day, it will be preſumed that the tenancy in queſtion commenced agreeably to the cuſtom. If a perſon engages as a ſervant in huſbandry, without any particular time being ſpecified, the effect of ſuch general hiring is a hiring for a year; and in queſtions of ſettlement where the particular hiring cannot be ſhewn, but a ſervice for a longer term than a year appears to have exiſted, it is a ſufficient ground for preſuming that it was under a yearly hiring, or at leaſt a general hiring, which has the ſame effect. See *Rex* v. *Lyth*, 5 *T. R.* 327. *Rex* v. *Long Whatton*, *id.* 447.

There is a rule that *omnia præſumuntur ritè eſſe acta.* A landlord inſtituted an ejectment againſt his tenant for non-payment of rent, and recovered judgment by default. After he had been ſeveral years in poſſeſſion, a new ejectment was brought on behalf of the tenant, on the footing of the original leaſe. It clearly appeared that there was a forfeiture for non-payment of rent; but it was inſiſted that an affidavit of the rent being in arrear, and of there being no ſufficient diſtreſs (which was a neceſſary proceeding in the firſt ejectment, in order to determine the leaſe,) ought to be produced in the ſecond, in order to repel the title founded on the leaſe. And it was ſaid, that a court will not preſume any thing in ſupport of a judgment obtained by confeſſion, or default, or in any other way than upon a trial of the merits. Lord *Mansfield* in the courſe of the argument obſerved, that it was only ſtated that there was no affidavit produced, not that there was no affidavit at all; that all preſumptions are dependent upon certain circumſtances, and ſuch circumſtances are proper for the conſideration of a jury. Beſides the general preſumption, that the proceedings were regular and *omnia ſolemniter acta*, here is a deciſive fact ſtated, that the defendant entered under *and by virtue* of the act of parliament. And the caſe does not ſtate affirmatively that the judgment was irregular, or expreſsly and explicitly that there was no affidavit at all, or indeed any thing whatever to take off the general preſumption, which was immenſely ſtrong the other way. *Doe* v. *Lewis*, 1 *Bur.* 614.

No verbal evidence is allowed of what has been ſaid by a priſoner, when brought before a juſtice of peace upon an accuſation of felony,

felony, unleſs it appears that his examination was not taken in writing; for as it is the duty of the juſtice to take ſuch examination, it is preſumed that he has done ſo, until the contrary is ſhewn; and if the examination is in writing, a parol account is not the beſt evidence. Where a perſon proved an original leaſe made in the time of queen *Elizabeth*, and poſſeſſion in himſelf and thoſe under whom he claimed, from 6 *Ann.* to 19 *G.* 3. the court held that it ought to be left to the jury, with a recommendation to preſume all meſne aſſignments. *Earl* v. *Baxter*, 2 *Bl. Rep.* 1228. Where truſtees were required to convey upon *A.* coming of age, the jury may preſume a conveyance to him, as it was what they were bound to do, and what a court of equity would have compelled them to have done if they had refuſed; but it is rather to be preſumed that they did their duty. *England* v. *Slade*, 4 *T. R.* 682. This laſt caſe however ſeems rather to have the complexion of a fiction, than of a real preſumption. With reſpect to the general principle of preſuming a regularity of procedure, it may perhaps appear to be the true concluſion, that wherever acts are apparently regular and proper, they ought not to be defeated by the mere ſuggeſtion of a poſſible irregularity. This principle however ought not to be carried too far, and it is not deſirable to reſt upon a mere preſumption that things were properly done, when the nature of the caſe will admit of poſitive evidence of the fact, provided it really exiſts.

It is a rule that *omnia præſumuntur contra ſpoliatorem.* In *Harwood* v. *Goodright*, above referred to, Lord *Mansfield* ſaid, that the jury might have had evidence to prove an inconſiſtent diſpoſition, or circumſtances to lay a fair foundation for preſuming it to be ſo, as ſpoliation, or the like; and again—In caſe the defendant had been proved to have deſtroyed the laſt will, it would have been good ground for the jury to find that it was a revocation. In *Cowper* v. *Earl Cowper*, 2 *P. Wms.* 720. the plaintiff, as heir of his father, *Spencer Cowper*, claimed an equitable eſtate which had been ſettled upon the firſt marriage of Lord *Cowper*, brother of *S. Cowper*, upon the iſſue of that marriage, *Spencer Cowper* being heir at law of ſuch iſſue. On behalf of the iſſue of a ſecond marriage, it was contended that there might have been a releaſe from *Spencer Cowper* to *Lord Cowper*; and as *Spencer Cowper* was the executor of Lord *Cowper*, and had, after his death, burned and deſtroyed ſeveral papers, it was further contended that the exiſtence and diſtruction of ſuch a releaſe ought to be preſumed. The Maſter of the Rolls (Sir *J. Jekyll*,) with reſpect to the nature of the claim, obſerved, that were he to conſider the matter, not as ſitting in judicature, but taking in all manner of conſiderations, ſuch as honour, gratitude, private conſcience,

ſcience, &c. he muſt think the claim ſhould never have been made. With reſpect to the deſtruction of papers, he ſaid the facts proved, certainly did give an unfavourable aſpect to the plaintiff's claim, but did not go ſo far as to bar it. After a very full examination of the facts which were proved, in order to eſtabliſh the charge of ſpoliation, he ſaid, "That had there been the leaſt poſitive proof of a releaſe from Mr. *Cowper*, he ſhould have diſmiſſed the bill, but when ſuch a releaſe or conveyance is only ſuppoſed or inferred from appearances, out of which the ſuppoſition does not neceſſarily or even naturally ariſe, he could not but think the title, though in his own opinion it ſhould not have been ſet up, was a clear and ſubſiſting one." The mere non-production of written evidence which is in the power of a party, generally operates as a ſtrong preſumption againſt him. I have adverted to this ſubject in the ſection on Deeds: I conceive that it has been ſometimes carried too far, by being allowed to ſuperſede the neceſſity of other evidence, inſtead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the ſubject in diſpute.

If the deſtruction, or withholding of evidence leads to a preſumption againſt the party, to whom it is imputable, much more is the fabrication (*a*), or alteration of it, calculated to induce the ſame effect. It muſt however be remembered, that whatever impropriety there may be in any ſuch ſuppreſſion or fabrication, the effect of it ought only to be applied to the deciſion of

(*a*) One of the greateſt and moſt difficult points in the *Douglas* cauſe, aroſe from Sir *John Stewart* having fabricated four letters, as received from *La Marre* the ſurgeon; a conduct certainly very ſuſpicious, and calculated to induce a ſtrong preſumption againſt the general veracity of his account. I believe the true concluſion, from all the circumſtances in that cauſe, to be that which was drawn by the Houſe of Lords in ſupport of the filiation; but it is impoſſible for great doubt not to hang upon a caſe affected by ſuch a circumſtance. This part of the caſe is the ſubject of the firſt of Mr. *A. Stuart*'s letters to Lord *Mansfield*, in which he charges him with ſoftening the inference reſulting from this fabrication, and contraſts his conduct upon that occaſion with that which he had purſued in the *Angleſea* caſe, where he had laid it down, that if the certificate of a marriage purporting to be a cotemporary act was a fabrication, the other evidence in ſupport of the marriage ought not to be believed. The following paſſage contains Mr. *Stuart*'s general obſervations upon this ſubject.

"I had been accuſtomed to think, that in judging upon evidence, a matter of ſuch infinite importance, in the conſtitution and juriſprudence of every well regulated ſtate, there were certain rules eſtabliſhed, which in every court, and in every country, were received as moſt invaluable guides for the diſcovery of truth. For inſtance, when it appeared that on the one ſide there was *forgery and fraud* in ſome of the material parts of the evidence, and eſpecially when that forgery could be traced up to its ſource, and diſcovered to be the contrivance of the very perſon whoſe guilt or innocence was the object of inquiry, in ſuch a caſe, I have always underſtood it to be an eſtabliſhed rule, that the whole of the evidence on that ſide of the queſtion muſt be deeply affected by a deliberate falſehood of this nature.

"The natural and neceſſary effect of ſuch a practice upon the minds of judges poſſeſſed of diſcernment and candour, is to make them extremely ſuſpicious of all the evidence tending

of the fact in diſpute, and a puniſhment ſhould not be inflicted under the name of a preſumption, when the fact ſuppoſed to be preſumed is not in truth believed.

It is certain that evidence which is falſe will ſometimes be reſorted to for the purpoſe of eſtabliſhing a fact that is true. Such conduct is not only in the higheſt degree reprehenſible, but is in general (and very properly) attended with the greateſt danger to thoſe who reſort to it. A ſtrong circumſtance of this kind is mentioned in *Coke's P. C. cap.* 104. There were grounds for charging a man with the murder of his niece, but the body of the child was not found; the priſoner being admoniſhed to find the child, brought another like her, who upon examination was found not to be the true child; upon which, with the other preſumptions, he was convicted and executed, and afterwards the child appeared to be alive. This caſe affords a very proper ground for Sir *M. Hale's* caution, not to convict of murder unleſs the body be found; but ſhould not produce too much intimidation againſt convicting upon preſumptive evidence (*a*).

As a general incident to all preſumptive evidence, it is requiſite that it ſhall have a proper foundation, and not reſt upon mere ſuggeſtion or ſurmiſe. This was clearly illuſtrated in the caſe of *Goodtitle dem. Brydges* v. *Duke of Chandos*, 2 *Bur.* 1065. Under a ſettlement *G. B.* was tenant in tail in poſſeſſion of certain lands, and tenant in tail in remainder of others, which had been limitted to his mother for her jointure. He ſuffered a recovery; and the jointreſs having lived ſeveral years, it was contended that a ſurrender from her for the purpoſe of making a tenant to the præcipe ought to be preſumed, but the court decided to the contrary. Lord *Mansfield* ſaid—There are two ſorts of pre-

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ing to the ſame concluſion with the forged evidence; parol teſtimony in ſupport of it will be little regarded; the forgery of the written evidence contaminates the teſtimony of the witneſſes, in favour of the party who has made uſe of that forgery, and nothing will gain credit on that ſide, but either clear and concluſive written evidence, free from ſuſpicion, or the teſtimony of ſuch a number of reſpectable diſintereſted and conſiſtent witneſſes, ſpeaking to deciſive and circumſtantiate facts, as leaves no room to doubt of the certainty of their knowledge, and the truth of their aſſertions.

"On the other hand, the proof of a forgery ſuch as has been deſcribed, muſt alſo have the effect to gain a more ready admiſſion to the evidence of the other party. If that evidence be conſiſtent, if it be eſtabliſhed by the concurring teſtimony of a crowd of witneſſes, and ſupported by various articles of written and unſuſpected evidence, the bias of a fair mind will be totally in favour of the party producing ſuch authorities, and againſt that which had been obliged to have recourſe to the forged evidence."

(*a*) Lord *Coke* after mentioning the fact ſays, "which caſe we have reported for a double caveat, 1ſt, to judges, that they in caſe of life judge not too haſtly upon preſumptions; and, 2d, to the true and innocent man, that he never ſeek to excuſe himſelf by falſe or undue means, leſt thereby he, offending God (the author of truth), overthrow himſelf as the wife did."

ſumptions,

sumptions, one a presumption of law not to be contradicted; the other a species of evidence; which latter must have a ground to stand upon, something from whence it is to arise. Where a person has power to suffer a recovery, and thereby bar the estate tail, *omnia præsumuntur rite et solemniter acta*, until the contrary appears, and it is reasonable that it should be so, but if the contrary shall appear, there is an end of the presumption. So where the freeholder is a trustee for the tenant in tail himself, and under his power and direction, it is a reasonable and just cause for presuming, that every thing was regularly transacted. So when the persons interested to object against the validity of a recovery, have had opportunity to make objections to it, but instead of doing so, have acquiesced under it, and not at all disputed its validity, this is a presumption that all was right and regular. But there can be no presumption of the nature of evidence in any case, without something from whence to make it, some ground to found the presumption upon. Whereas, here is absolutely nothing from whence to presume. No sort of ground to build any presumption upon. Mr. Justice *Wilmot* said, that he had no notion of a presumption without some facts or circumstances to found it upon. This would be inferring something seen, from something not seen. Length of time alone is nothing; the presumption must arise from some facts, or circumstances arising within the time.

The facts from which a presumption is deduced, must be such as are not merely consistent with the proposition, which they are intended to establish: for evidence, which leaves it indifferent whether a given supposition is or is not founded upon truth, is in effect no evidence at all; neither is a mere preponderance of probability sufficient to constitute a presumption; although the consistency of the fact confirms the assent, to any actual uncontradicted testimony in support of it, in the first case, and the preponderance indicates the preference which, *cæteris paribus*, ought to be given, in the second. A presumption can only be applied, when the circumstances are such as to render the opposite supposition improbable. The degrees of probability are very extensive, and a considerable latitude must be allowed to the judgment applied to the circumstances of each particular question; which, as it cannot be previously defined, is from its very nature subject to be affected by the variety of individual sentiments. Considerable attention ought to be paid to the consequences of the decision, and to the effect of error as it may be committed on the one side or the other, but this caution should not be suffered to degenerate into excessive timidity. And where the judgment is fully and satisfactorily convinced, the conduct should not be in-

fluenced by the mere apprehenſion of a remote improbable contingency, or the ſuggeſtion of fanciful hypotheſis. The effect and weight of preſumption cannot be influenced by any conſideration more extenſively, than by the opportunity which the nature of the caſe affords, to ſupport or contradict it by direct teſtimony. A perſon who reſts his caſe on the argument, that certain circumſtances which he adduces, afford a preſumption of the exiſtence of a diſputed fact, is not entitled to any attention whatever, if he cannot but be in a condition to give direct and poſitive evidence of the fact itſelf, ſuppoſing it to be true; and on the other hand, preſumption may be regarded as equivalent to abſolute proof, when the party againſt whom it militates, cannot but be in a condition to defeat it by poſitive teſtimony, if falſe. Where the inconſiſtency of the admitted facts with an oppoſite ſuppoſition to that which is inferred, is abſolute and complete, ſo as to amount to a moral or phyſical impoſſibility, the term preſumption, as I have already obſerved, is inapplicable, and it is a caſe of perfect proof. In other caſes the exiſtence of a mere poſſibility to the contrary may be ſo ſlight that the grounds of preſumption will affect the mind, with the ſame conviction as abſolute demonſtration. Thus, to inſtance the caſe of the controverſy between *Marſh* and *Travis*, if *Robert Stevens*, in collating a given number of manuſcripts of the *New Teſtament*, found one which he denoted by an arbitrary character, wherein there were twenty-four ſingular readings in the *Catholic Epiſtles*, and Mr. *Marſh* afterwards found a manuſcript having a ſet of ſingular readings, exactly coinciding with thoſe indicated by *Stevens*, it might be ſhewn (as it has been) that the fact of identity is only leſs than certainty by a degree, which it is almoſt out of the power of language to expreſs, and to all practical purpoſes, the conviction reſulting from this propoſition becomes equivalent to certainty itſelf. But let the degree of improbability be ever ſo great, if in any the ſlighteſt circumſtance a clear abſolute unanſwerable inconſiſtency is ſhewn, the ſuppoſition that was aſſumed is entirely deſtroyed (*a*). Suppoſing, for inſtance, with reference to the ſame controverſy, that it was abſolutely and completely proved, that in the manuſcript of *Stevens* where *K* is wanting, *U* was not included in its room, and that in the manuſcript of *Marſh*, *U* was included, the incompatibility would deſtroy the ſtrongeſt poſſible inference from the conformity. But then in proportion to the

(*a*) Several circumſtances were adduced in the *Douglas* cauſe to ſhew cauſe that the child produced as the ſon of lady *Jane*, was in fact the child of one *Mignon*, which was taken from its parents by ſome ſtrangers about the time of the aſſerted delivery, but the child of *Mignon* had blue eyes, and thoſe of the perſon whoſe birth was in diſpute were black. This difference fully eſtabliſhed would wholly deſtroy all poſſible evidence of coincidence, unleſs the colour of the eyes is ſubject to change, which I conceive is not the caſe.

poſitive inference of identity on the one hand, the oppoſite evidence of incompatibility ought to be manifeſt and unimpeachable on the other, and if inſtead of its being fully aſcertained, that the *U* was not included in the manuſcript of *Stevens*; the caſe amounts to no more than that there was no actual notice that it was included, the argument of coincidence is not defeated, unleſs it can be ſhewn that it was impoſſible that the *U* ſhould be included, without having been noticed in making the collation, a ſuppoſition which is not only deſtroyed by its intrinſic weakneſs, but contradicted by ſeveral poſitive inſtances. Wherever, therefore, the poſitive known argument leads to a clear and ſatisfactory concluſion on the one ſide, it ought not to be deſtroyed by the mere exiſtence of a circumſtance not abſolutely accounted for on the other.

The following paſſage from *Burlamaqui* on natural law, and the note which he ſubjoins from the *Bibliotheque Raiſonée*, afford ſome important conſiderations upon this ſubject.—When a truth is ſufficiently evinced by ſolid reaſons, whatever can be objected againſt it ought not to ſtagger or weaken our conviction, as long as they are ſuch difficulties only as embarraſs or puzzle the mind, without invalidating the proofs themſelves. *Burl.* There is a wide difference between ſeeing that a thing is abſurd, and not knowing all that regards it; between an unanſwerable queſtion in relation to a truth, and an unanſwerable objection againſt it, though a great many confound theſe two ſorts of difficulties; thoſe only of the laſt order, are able to prove that what was taken for a known truth cannot be true, becauſe otherwiſe ſome abſurdity muſt enſue. But the others prove nothing but the ignorance we are under, in relation to ſeveral things that regard a known truth. *Bib. Rais.*

Therefore when a ſeries of facts diſtinctly and unequivocally proved manifeſtly tends to one concluſion, and another fact is propoſed in contradiction to that concluſion, the mere inability to account for ſuch oppoſite fact, is not ſufficient to deſtroy the inference deduced from the others, but the poſitive inconſiſtency ſhould be fully ſhewn. If the facts in ſupport of the concluſion are fully eſtabliſhed, and thoſe in contradiction to it reſt upon mere inference and probability, which unoppoſed might be ſufficient to eſtabliſh their exiſtence, this inference may not be ſufficient to deſtroy the concluſion, unleſs it accounts for the facts from which that concluſion is drawn; as a concluſion reſulting from certain facts on the one ſide, cannot be ſufficiently encountered by a concluſion deduced from uncertain facts on the other. If the evidence in ſupport of the concluſion is free from the ſuſpicion of error and inaccuracy in its leading principles, but the relation of any inciden-

tal circumſtance of inconſiſtency which is alleged againſt it, may be ſubject to thoſe imputations, it is more reaſonable to adhere to the firſt, than to be influenced by the laſt, unleſs, as in the preceding caſe, the oppoſite relation is calculated not only to oppoſe the concluſion, but to account for the undiſputed facts (*a*). Sometimes a concluſion from circumſtances may be ſo forcible as to diſcredit even the poſitive teſtimony of a fact in abſolute contradiction of it, as for inſtance, where a crime is fully proved to have been committed, and the circumſtances upon which it is imputed to the priſoner, cannot upon any reaſonable ſuppoſition be reconciled with his innocence, the evidence of an alibi is naturally attended with ſuſpicion and diſtruſt, and requires a ſtronger ground of reliance, than the ordinary preſumption of the veracity of evidence. I ſuppoſe all arguments of inaccuracy, from an indiſtinctneſs in the obſervation of a particular time to be out of the queſtion; for when the caſe may be reducible to that, it admits a leſs violent ſolution.

The circumſtances from which a preſumption is deduced, may be dependent or diſtinct. In the firſt caſe, all the facts conſtitute one entire chain, and a removal of any one of the links deſtroys the connection of the whole; in the ſecond, the removal of any one circumſtance leaves the effect of the others ſubſiſting; but the concurrence of ſeveral diſtinct and independent circumſtances, leading to the ſame concluſion, greatly increaſes the ſtrength of the whole, and each affords a mutual ſupport and corroboration to the other. It is judiciouſly obſerved in *Butler's Analogy*, that probable proofs, by being added together, not only increaſe the evidence but multiply it; and that unleſs the whole ſeries of things, which are alleged in the argument he had before adduced, and every particular thing in it can reaſonably be ſuppoſed to have happened by accident, then is the truth of it proved in like manner, as if in any common caſe numerous events acknowledged were to be alleged in proof of any other event diſputed; the truth of the event diſputed would be proved not only if any one of the acknowledged ones did of itſelf clearly imply it, but though no one of them ſingly did ſo, if the whole of the acknowledged events, taken together, could not in reaſon be ſuppoſed to have happened unleſs the diſputed one were true.

(*a*) The following caſe which has fallen under my obſervation, is partly connected with this reaſoning: *A.* being in company with *B.*, had his pocket picked of three guineas; *B.* told *C.* rather triumphantly, that he had picked *A.*'s pocket of 4 guineas. This was ſtated by a court of quarter-ſeſſions to the jury as an inconſiſtency, which deſtroyed the preſumption of guilt; but ſuppoſing there to be a falſehood, or inaccuracy with reſpect to the number mentioned by *B.*, or an inaccuracy with reſpect to *C.*'s relation, the variation in that reſpect did not deſtroy the preſumption, or rather concluſion ariſing from *B.* ſaying, that he had picked the pocket of *A.*

In

In the preceding observations, the facts from which the conclusion is drawn are assumed to be clear and undisputed; if some facts naturally tending to one conclusion are clearly ascertained and others which are in themselves ambiguous would conform to such conclusion, so that a given supposition would render the whole connected and consistent; there may be in general sufficient ground to infer, not only the existence of the conclusion in question, but the true exposition of such ambiguous facts, as are consistent with that conclusion; and sometimes, even, if all the facts taken separately may be equivocal, but their union leads in one point of view to a clear and distinct conclusion, and shews a relation and connection, but no reasonable ground can be suggested for a similar concurrence to that which actually exists upon a different supposition, such facts may mutually and reciprocally receive a proper exposition, by the general concurrence of the whole, especially where the conclusion is unopposed by other facts, which are indicative of a different conclusion. The presumption of a fact which is deduced from several undisputed circumstances, is sometimes more satisfactory than the positive evidence of the fact itself, which may be open to mistake, or misrepresentation, and it is clear, that a well connected chain of circumstances is of all evidence the least suspicious in point of veracity, for it is the evidence which is least capable of being fabricated with effect.

But it often requires great judgment and discretion to trace with propriety the connection between the existing circumstances, and the presumption which is applied to them; and there is no enquiry in which rapidity and precipitation may be more frequently detrimental. I have already observed, that a presumption is not destroyed by the mere difficulty of accounting for any incidental circumstance, provided the other circumstances which are undisputed necessarily tend to the conclusion in dispute. On the other hand a presumption is not to be hastily formed, from the difficulty of explaining the cause and reason of existing circumstances, unless the whole of the subject with which those circumstances are connected is sufficiently seen. This applies more strongly, when the difficulty is to account for the non-existence of facts, which might be reasonably supposed to exist upon a different supposition from that which is assumed. There is no point upon which presumption is more material, than in ascribing to particular conduct, motives and dispositions which cannot be seen, and can only be inferred from the facts that are seen, and the probable motives by which they may be occasioned; but it will often be very fallacious, to reason upon

the motives or diſpoſition of others, without a moſt perfect view of all the circumſtances with which they are connected.

In the *Douglas* cauſe, ſeveral queſtions were propoſed with reſpect to the motives of lady *Jane*, in doing or not doing particular acts, ſuppoſing the filiation to be real. In anſwer to one of the queſtions, Why did ſhe not bring evidence of the children being really hers? It is truly obſerved, that it is difficult to ſay what is the propereſt manner of acting, before the event points out the inconvenience of acting in one manner rather than in another, and even ignorance can reaſon better after the fact, than wiſdom can before. Towards the cloſe of the caſe are the following obſervations. "If the defender has not been able to account for every particular in the conduct of his parents, the fault lies in the nature of things. The attack made on the conduct of the defender's parents, has obliged him to explain it upon ſuch motives as naturally infer their innocence, which muſt be concluſive againſt an argument which aſſumes for its baſis their guilt. The poſſibilities which run through the purſuer's reaſoning on this head, are anſwered by probabilities: and although it is abſurd to demand, and impoſſible to anſwer, why an action in itſelf indifferent was done in one way rather than another, yet the defender hopes that he hath left no part of his parents' conduct unaccounted for. The preſumption for innocence ſupports the account he hath given: and the purſuers have perverted all principles of common ſenſe, in order to wreſt a natural behaviour, to an unnatural preſumption of guilt. The fallacy of their argument has forced them to deſtroy under one head, what they had reared under another; to confound things and terms in their nature moſt oppoſite; and to proceed in a perpetual rotation, inferring a crime from circumſtances of conduct, and explaining that conduct by the aſſumed principle of a crime committed. In other words, they were guilty, therefore they acted ſo;—they acted ſo, therefore they were guilty. The trifling objections raiſed to the manner in which the defender's parents acted, down to their arrival in *Paris*, have been ſtated and refuted in the preceding part of this caſe. The circumſtances of their fortune account for the retirement, not myſtery, in which they lived there: and the genuine, unvaried, parental tenderneſs with which they treated the defender from the hour of his birth, till that ſolemn conſummation which their dying behaviour gave to his ſtate of filiation, is more than a ſufficient anſwer to the criticiſms, not arguments of the purſuers. The temporary motives which ariſe from particular characters; and particular ſituations are too undetermined, to become the foundation of a legal deciſion.

But

But if the defender's caſe even ſtood on this iſſue, he would be warranted, from the moſt undoubted evidence, to affirm, that the conduct of his parents was fair, natural, and unaffected, if they are ſuppoſed innocent; but forced, unnatural, and affected upon the purſuers' unjuſt aſſumption, that they were guilty of an impoſture."

One inſtance adduced in the civil law, of a light and inſufficient ground of preſumption is, where a guardian who had no eſtate of his own, is found to have enriched himſelf during the tutelage of his ward. This circumſtance does not warrant any inference, that the acceſſion of fortune has ariſen from miſapplying the property of the ward. *Nec enim pauperibus induſtria vel augmentum patrimonii quod laboribus et multis caſibus quæritur interdicendum. L.* 10. *Cod. Arb. Tutel.* I have in an inferior court known the circumſtance of five guineas having been ſtolen from one man, and the ſame amount being about the ſame time ſpent by another, allowed as a ſufficient preſumption to warrant a conviction of felony.

By the *Roman* law, if a father and ſon periſhed at the ſame time by ſhipwreck, or in battle, and there was no diſtinct evidence to aſcertain which of the two died firſt, the preſumption was, that the ſon died firſt, if under the age of puberty, but that if he was above that age he was the ſurvivor; upon the principle that perſons under the age of puberty, are leſs robuſt than adults; but that after paſſing that period, a younger perſon had more ſtrength than an elder. But this rule was ſubject to ſome exceptions for the benefit of mothers, and in ſupport of the rights of patronage and fiduciary bequeſts. This point aroſe upon the death of General *Stanwix* and his daughter, mentioned in the caſe of the *King* v. Dr. *Kay.* 1 *Bl. R.* 640, the property being claimed by the brother of the daughter's mother, upon the preſumption that ſhe had ſurvived her father; the deciſion in the caſe reported was upon a collateral point, and the queſtion was never judicially determined. In Mr. *Fearne*'s poſthumous works, there is a very elaborate diſcuſſion of the ſubject, in which his concluſion ſeems to be, that the preſumption of the daughter's ſurvivorſhip could not be ſupported. This ſubject came before Sir *William Wynne*, as judge of the Prerogative Court, in the caſe of *Wright* v. *Netherwood*, 6 *May*, 1793, upon a queſtion reſpecting the implied revocation of a will by marriage, and the birth of a child, of which I have inſerted a note to the caſe of *Lugg* v. *Lugg*, 2 *Salk.* 593. The father and child having periſhed together by ſhipwreck, the learned judge ſaid, that with reſpect to the priority of death, it had always appeared to him more fair and reaſonable in theſe unhappy caſes, to conſider all the parties as dying at the ſame inſtant

Not only is an actual adjudication binding upon the parties, but even where a perſon who had paid a debt, but upon being ſued for it, could not find the receipt; and paid it over again, it was ruled that he could not afterwards (having recovered the receipt) maintain an action to recover it back. *Marriott* v. *Hampton*, 7 *T. R.* 269. A ſimilar caſe was cited, in which there was an oppoſite determination, and Mr. Juſtice *Lawrence* obſerved, that if that caſe was law, it went the length of eſtabliſhing this, that every ſpecies of evidence which was omitted by accident to be brought forward at a trial, may ſtill be of avail in a new action, to overhale the former judgment; which was too prepoſterous to be ſtated. Lord *Kenyon* has ruled at *Niſi Prius*, that even where a party, upon being ſued, paid the money demanded, at the ſame time proteſting that it was not due, he could not ſuſtain an action for the repetition of it. *Brown* v. *M'Kinally*, 1 *Eſp. Caſ.* 279. In a former caſe, an action had been brought by the indorſee, againſt the maker of a promiſſory note, who, after interlocutory judgment ſigned, paid part of the money, and gave a warrant of attorney for the reſidue, and afterwards brought an action to recover back the money which he had paid, giving evidence that the plaintiff in the former action had notice of the note being given on an illegal conſideration, to which it was objected, that the action was in effect to put the ſame ſum in litigation a ſecond time; but Lord *Kenyon* overruled it, on the ground that the money had been paid under a compromiſe, and not under the judgment of a court. The caſe came before the court, upon a queſtion reſpecting the admiſſibility of evidence, entirely collateral to the nature of the demand; and a rule for a new trial was refuſed, no notice being taken of the objection to the cauſe of action. *Cobden* v. *Kendrick*, 4 *T. R.* 431. It is very difficult to reconcile this determination with that which afterwards took place in *Marriott* v. *Hampton*; and indeed it ſeems a perverſion of terms, to call an indulgence in point of time, with reſpect to the payment of part of the money demanded, a compromiſe, ſo as to annul the payment of a part, when the payment of the whole would have been concluſive. The deciſion of *Marriott* v. *Hampton* was certainly contrary to the moral juſtice of the caſe, as between the parties; but the deciſion ſeems fairly to reſult from the correct principles of law, ſo far as regards the money paid in conſequence of the action. Perhaps the point, that the money paid before the action brought, might have been reclaimed, on the ground, that the party by bringing his action had diſavowed it as a payment of the debt, would, if it had been made, have fairly juſtified a verdict againſt the defendant retaining the unconſcientious advantage which he had acquired.

In

In *Walker* v. *Witter*, *Doug.* 1. an action was brought on a judgment in *Jamaica*, in which it was incidentally obſerved, that courts not of record, or foreign courts, or the courts of *Wales*, have not the privilege of their judgments not being controverted. The caſe of *Sinclair* v. *Frazer*, before the Houſe of Lords, was cited, in which it was part of the reſolution, that the judgment of a court in *Jamaica* ought to be received as *prima facie* evidence of the debt, and that it lay upon the defendant to impeach the juſtice thereof; but that reſolution as well as the obſervation in *Walker* v. *Witter*, was extra-judicial and collateral to the deciſion. But in *Herbert* v. *Cook*, *Durnford's* note to *Willes's Reports*, 36. a plea to a declaration in debt on the judgment of an inferior court not of record, that the cauſe of action aroſe without the juriſdiction of the inferior court, was upon demurrer adjudged to be good. Lord *Mansfield* ſaid, that the argument how far the party was precluded after judgment, from alleging that the cauſe of action aroſe out of the juriſdiction, was not applicable; for the demurrer admitted the fact, ſo that it appeared on the record, that there was no cauſe of action within the juriſdiction. But with deference, I ſhould conceive that if the defendant was precluded from alleging, that the cauſe of action did not ariſe within the juriſdiction, his actually making ſuch an allegation could not reaſonably be ſupported, and therefore that the fictitious admiſſion of the truth of a plea, which ariſes from denying its ſufficiency, did not warrant getting rid, by a ſide wind, of the principal queſtion, whether a new perfect and indefeaſable cauſe of action, independent of all queſtion reſpecting the rectitude of the original judgment, did not ariſe by virtue of the judgment itſelf. In *Galbraith* v. *Neville*, mentioned in a note to the third edition of *Douglas*, Lord *Kenyon* expreſſed ſtrong doubts reſpecting the doctrine advanced in *Walker* v. *Witter*, which was maintained on the other hand by Mr. Juſtice *Buller*. I conceive that there is no other inſtance in which it has been judicially decided, that the judgment of a court not of record; or of a foreign court, was not concluſive, with reſpect to the point decided, ſo far as the ſuit contained proper parties and incidents to have given it a concluſive effect, if the court had been of record; and many caſes which have been decided reſpecting prize cauſes, are directly in ſupport of the oppoſite propoſition. The caſe of *Moſes* v. *Macfarlane*, 2 *Bur.* 1005. which I am next to mention, did not turn upon the circumſtance of the inferior court, not being of record.

In that caſe the plaintiff had indorſed to the defendant four promiſſory notes under forty ſhillings each for a particular purpoſe, the defendant ſued the plaintiff upon them, in the court of conſcience and obtained judgment, under which he received the amount; and an action of money had and received, was ſuſtained for

for recovering it back again. The case is a valuable one, so far as it expounds the important principles upon which that right of action depends; but, as a precedent upon the immediate point, that a sum of money paid under the direct authority, of the judgment of a court of competent authority, may be reclaimed as unduly paid, it directly militates against every principle that can be applied to the subject. The decision gave great dissatisfaction when it was pronounced, and I conceive it would clearly now not be regarded as an authority. I have observed in an essay in the action for money had and received, upon the arguments adduced in support of the decision, and have had the satisfaction of finding my view of the subject confirmed, by that of Lord Chief J. *Eyre*, (of which I was not aware at the time of my own examination), in *Philips* v. *Hunter*, 2 *H. B.* 402. I have often thought, what I perhaps may be censured for suggesting, that Lord *Mansfield* was, in the case of *Moses* v. *Macfarlane*, in rather too great haste to promulgate the principles which he had imbibed from the *condictio indebiti* of the *Roman* law, and that he applied them in a case where that law had clearly interposed the exception, that *propter auctoritatem rei judicatæ repetitio cessat. Ff. Mandat*, 59.

The rule that a judgment can only be conclusive between the parties, or those deriving title under them, is very fully established, and in general it can be admitted even as evidence only between such parties; but to that there are some exceptions, which are referred to below (*a*). In our law, as in the civil law, the same person is only barred when suing in the same right, therefore a person who has sued as administrator, and is barred, may have an action afterwards upon the same obligation as executor, for although the plaintiff was in truth executor at the time of the prior action, his

(*a*) A judgment is evidence against other parties, whenever the matter in dispute is a question of public right, and all persons standing in the same situation are affected by it, and it is evidence to support or defeat the right claimed: thus a verdict finding a prescriptive right of tything * ; the right of a city to a toll † ; the right of election of a churchwarden ‡ ; a customary right of common ; the liability of a parish to repair a particular road § ; a public right of way ‖, or the like, is evidence for or against the custom, or right, though neither of the litigating parties are named in, or claim under those who are parties to the record. *Peake's Evidence*, 2*d. Ed.* 40. As to the right of the reversioner or remainder-man, to give in evidence a verdict in favour of the tennor or tenant for life. *Vi. Pike* v. *Crouch*, 1 Lord *Raym.* 730. *Rushworth* v. *Countess of Pembroke*, *Hard.* 472. *Gilb. Ev.* 35. *Peak*, 39. A verdict against one servant of *J. S.*, as to the master's right of fishery is evidence, but not conclusive evidence against another servant, maintaining the same right. *Kemmerfley* v. *Orpe*, *Doug.* 517.

* *Gilb. Ev.* 36. † *City of London* v. *Clarke*, *Carth.* 181.
‡ *Barry* v. *Banner*, *Peakes*, *N. P.* 156. § *Rex* v. *St. Pancras*, *ibid.* 219.
‖ *Reed* v. *Jackson*, 1 *East*, 355.

mistaking

miſtaking his remedy does not prevent his maintaining his true action. *Robinſon*'s caſe, 5 *Co.* 33. *a.*

In *Incledon* v. *Burgeſs*, 1 *W.* and *M.* 1 *Sh.* 27. *Camb.* 166. cited in the before-mentioned caſe of *Outram* v. *Morewood*, the queſtion aroſe, whether after an action by one plaintiff, and plea of preſcription with judgment thereupon for the defendant, the judgment was an eſtoppel againſt traverſing the ſame preſcription, in an action brought by the ſame plaintiff jointly with another perſon? but the point was not decided, judgment having been given on a collateral objection. One of the points eſtabliſhed in *Outram* v. *Morewood*, was that the former verdict againſt the wife was an eſtoppel againſt the huſband claiming in her right. In *Ingram* v. *Bray*, 2 *Lev.* 210. the defendant as bailiff of *J. S.* made cognizance for taking a herriott, to which it was pleaded that *A.* and *B.* as bailiffs of *J. S.*, had formerly made cognizance for the ſame herriott; and it was ruled that the plea was not good, without alleging that the cognizance was made by the aſſent of *J. S.*, as it might have been by a ſtranger without his privity.

It is eſtabliſhed by ſeveral caſes, that a judgment in one action is a bar in another action of a different nature; ſo that the ſame cauſe of action ſhall not be brought twice to a final determination: and the ſame cauſe of action is where the ſame evidence will ſupport different actions, although the actions may be grounded on different writs. See *Kitchen* v. *Campbell*, 3 *Wilſ.* 304. *S. C.* 2 *Black.* 827. by the name of *Kitchen* v. *Campbell*, in which it was decided that a verdict for the defendant in trover was a bar in an action for money had and received, for the money ariſing from the ſale of the ſame goods. See alſo the ſeveral caſes there cited. But the propoſition, as ſtated in the preceding caſe, is properly qualified ſo as to be conſiſtent with the doctrine contained in ſeveral authorities, that where the point has not been brought to a final determination in the firſt action, but the plaintiff failed from the mode of action not being adapted to the nature of the claim, a judgment for the defendant in the firſt action was no bar to the plaintiff in the ſecond.

Where an action of debt was brought upon an obligation, in the condition of which there were two points to be performed by the obligor, at the requeſt of the obligee, and the defendant pleaded in bar that the plaintiff had made no requeſt, upon which the iſſue was found for the defendant, and afterwards the plaintiff brought another action upon the ſame obligation, and the defendant pleaded the former action in bar and not by way of eſtoppel; the opinion of the court was, that it was a perpetual bar to the obligation,

tion, the verdict being in force, although the obligation was forfeited for the other point. *Dyer*, 371. *b.* I conceive however that that determination would not apply to excluding an action upon a ſubſequent breach; but only to bar any action for a cauſe exiſting when the former was brought. The principle, that if the ſubject matter has been once properly in judgment, the caſe ſhall not be again open to diſcuſſion, on account of the ſtating a ground of deciſion not before adduced, is illuſtrated by the caſes of *Greathead* v. *Bromley*, 7. *T. R.* 455. *Schumman* v. *Weatherheart*, 1 *Eaſt*, 537. in which it was held that after an application to ſet aſide an annuity, for non compliance with the proviſions of the annuity act, had been diſmiſſed, the application could not be renewed, by making objections not before entered into. In the firſt of theſe caſes, Lord *Kenyon* obſerved, that the act of parliament gives a ſummary juriſdiction to the court, to be exerciſed according to a known legal diſcretion, and that they could not govern their diſcretion better than by analogy to the proceedings at common law; where if an action be brought, and the merits of the queſtion diſcuſſed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvas the ſame queſtion again in another action, although perhaps ſome objection or argument might have been *omitted to be* (*a*) urged upon the firſt trial, which would have warranted a different judgment. But relief was afterwards given in with reſpect to the ſame annuity, in the Court of Chancery. See *Bromley* v. *Holland*, 7 *Veſ.* 3. The queſtion, how far a court of equity is authorized to reſcind an inſtrument, after an ineffectual application for the purpoſe in a court law, where there are no equitable circumſtances, and the court of law has full concurrent authority, was not diſcuſſed with that particularity which the importance of it would ſeem to require.

In caſe of ejectment, a verdict in one cauſe is not concluſive in another; but this ariſes from the fictitious quality of the action, and from the real parties not being recognized ſo far as to let in this objection. The judgment, however, is concluſive in an action for meſne profits between the real ſubſtantial parties to the firſt cauſe, ſo far as regards the poſſeſſory right neceſſary to maintain the action. But (according to the paſſage already quoted in the ſection on Records), the judgment, like all others, only concludes the parties as to the ſubject matter of it. Therefore beyond the time laid in the demiſe it proves nothing at all; becauſe beyond that time

(*a*) Theſe words are not in the report, but the ſubject matter requires them to be ſupplied, in order to ſupport the ſenſe of the context.

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the plaintiff has alleged no title, and need not prove any. As to the length of time the defendant has occupied, the judgment proves nothing, nor as to the value. *Aplin* v. *Parkin*, 2 *Bur.* 665.

With reſpect to deciſions which operate *in rem*, the judgment is binding againſt all perſons, upon the ground that all the world are parties to the proceeding.

This doctrine has been principally applied in the caſe of condemnations in the Exchequer, and in caſes of prize. It is perfectly familiar, that a judgment of condemnation in the Exchequer is concluſive as to the property againſt all the world. There has been a conſiderable diſcuſſion upon the queſtion, whether the ſame effect was applicable to condemnations by commiſſioners of exciſe. In *Henſhaw* v. *Pleaſance*, 2 *Bl. Rep.* 1174. the Court of Common Pleas, upon the ground of a diſtinction between courts of record and other juriſdictions, were of opinion that it was not; but there were ſeveral preceding caſes cited in *Gahan* v. *Maingay*, *infra*, to the contrary; and in the ſame caſe is cited a ſubſequent deciſion by Lord *Mansfield* at *Niſi Prius*, in a caſe of *Dixon* v. *Cook*, which was removed upon bill of exceptions into the Exchequer Chamber, but never brought to judgment, in ſupport of the concluſive effect of the condemnation. In the caſe of *Gahan* v. *Maingay*, *Ridgeway*, &c. The ſubject received a very elaborate diſcuſſion in the courts of *Ireland*. It was decided in the Court of Exchequer, that the condemnation of ſub-commiſſioners was not concluſive, which deciſion was received in the Exchequer Chamber, by the Lord Chancellor aſſiſted by the two Chief Juſtices; and all the caſes bearing upon the ſubject, were very fully and diſtinctly taken into conſideration. The diſtinction with reſpect to a juriſdiction of competent authority, not being of record was ſhewn to be without foundation. The Lord Chancellor obſerved, that the Eccleſiaſtical Court is not a court of record; the Admirality Court is not a court of record; the Prize Court is not a court of record; yet was it ever heard that the juſtice of a ſentence pronounced by the Eccleſiaſtical Court, or the Admiralty Court, or the Prize Court, upon a matter confeſſedly within their ſeveral juriſdictions, was ever queſtioned upon the trial of a collateral action for damages in any of the ſuperior courts. It never yet was conſidered, (except in *Henſhaw* v. *Pleaſance*) that the judgment of a court of competent juriſdiction, could be queſtioned in a collateral action, in which it was pleaded or given in evidence, merely becauſe the court, in which the judgment was pronounced, was not a court of record (*a*).

In

(*a*) In the courſe of his judgment, his Lordſhip ſaid, "It has been urged at the bar, that

In *Scott* v. *Shearman*, 2 *Bl. Rep.* 977. It was contended that although a judgment of condemnation in the Exchequer was concluſive with reſpect to the forfeiture of the goods, it did not protect the officer from his miſbehaviour in an an action of treſpaſs; that though concluſive *in rem*, ſo that the right of the crown to the goods ſhould never be conteſted again, it was not concluſive *in perſonam*, in caſe the owner could prove that they were in fact not ſeizable, and ſhould bring an action for damages; but the contrary was decided, as the only poſſible ground that the plaintiff could rely upon, in the caſe before the court, which was unaccompanied by miſbehaviour, or any unwarrantable violence, was, that the goods were not in truth liable to be ſeized. The application of the ſame doctrine to a condemnation by commiſſioners, was the principal point in *Gahan*, v. *Maingay*, *Lord Carleton* taking notice that the ſole ground of the action was the illegal ſeizing and carrying away the plaintiff's goods, and that the verdict did not find any circumſtances of ill conduct accompanying the ſeizure, which, independent of the ſuppoſed illegality of the ſeizure, could maintain an action of treſpaſs.

In *Cooke* v. *Sholl*, 5 *T. R.* 255. it was a matter of diſcuſſion, whether a judgment of acquittal in the Exchequer is concluſive on the one ſide, as a verdict of conviction is on the other, but the caſe was decided upon a collateral ground. In *Viner's*, *Abr. Tit. Evidence*, *Price Baron*, is ſaid to have admitted ſuch evidence as concluſive. Upon principle, I ſhould conceive that the oppoſite determination would be more correct, as ſuch an acquittal would be warranted upon the mere negative ground, that the crown had not adduced ſufficient evidence to ſupport the ſeizure; and an individual, having a collateral intereſt in ſupporting the legality of the ſeizure, is not a concurrent party with the crown in ſupporting the condemnation, and aſſerting the claim of property on the one ſide, in the ſame manner as every perſon having an intereſt in op-

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that the commiſſioners, and ſub-commiſſioners of exciſe are illiterate, and that they are partial and intereſted men. But if the legiſlature has thought fit to commit judicial powers to men of that deſcription, we ſhould very much exceed our juriſdiction, and groſſly miſtake the authority committed to us, if, in giving judgment upon this record, we were to enter into a conſideration of the policy of that eſtabliſhment. Sitting in a court of law, I am not at liberty to enter into an examination of the juſtice, or injuſtice of any judgment of a court of competent juriſdiction, unleſs it comes before me by writ of error. All parties to ſuch a judgment are bound by it, until it is reverſed by a tribunal having competent authority to review it, I know of no ſuch dangerous and extravagant exceſs, into which any court of juſtice can be betrayed, as entering into a diſcuſſion of legiſlative policy in erecting particular tribunals. If the parliament has thought fit to commit judicial powers to exciſe officers of a particular diſcription, we can only ſee that they do not exceed the juriſdiction intruſted to them. If they do not exceed their juriſdiction, we have no authority to pronounce that they are incompetent or corrupt judges."

poſing

poſing ſuch condemnation, is in contemplation of law a ſufficient party in the other.

There is no inſtance, in which the ſupport given by the *Engliſh* courts of juſtice to the judgment of a competent authority, is more conſpicuous than in the effect allowed to foreign condemnations in matters of prize, even where ſuch condemnation has appeared on the face of the proceedings to be an outrageous violation of every principle of right and juſtice. If the condemnation is pronounced on the ground of a want of neutrality, or a violation of treaties, which are juſt cauſes of capture, it is however iniquitious, abſolute, and concluſive. *Geyer* v. *Agridur*, 7. *T. R.* 681. *Gunetts* v. *Kenſington*, 8 *T. R.* 230. *Buſing* v. *Royal Exchange Aſſurance*, 5 *Eaſt*, 99. But if the fact concluded is not a legal ground of condemnation, the condemnation has not any legal effect; in other words, a fact eſtabliſhed by a foreign ſentence of condemnation has no other effect than the ſame fact eſtabliſhed in any other manner. *Calvert* v. *Bovill*, 7 *T. R.* 523. *Mayne* v. *Trotter*, *Park. Inſ.* 363. *Polland* v. *Bell*, 8. *T. R.* 434. *Bird* v. *Appleton*, 8 T. *R.* 562. No formality of expreſſion is requiſite, provided it evidently appears that the condemnation was on a legal ground. *Barzillay* v. *Lewis*, *Park*, 359. and if no ſpecial ground of condemnation appears, it is equivalent to a poſitive ſentence of condemnation as enemy's property. *Saloucci* v. *Woodmaſs*, *Park*, 362. If there is any ambiguity in the ſentence, ſo that it does not appear whether the condemnation was on the ground of being enemy's property, or upon a poſitive regulation as an *arrêt*, for declaring veſſels prize if any papers have been thrown into the ſea, the truth may be ſhewn. *Bernardi* v. *Molbeaux*, *Doug.* 575. The ſentence is only binding as to the concluſion, and not as to the truth of the premiſes from which that concluſion is formed. *Chriſtie* v. *Secretan*, 8 *T. R.* 192. But it is eſſentially requiſite to the validity of a ſentence, that it ſhould be pronounced by a court of competent juriſdiction: and, as it is contrary to the law of nations, for a belligerent to erect a tribunal in a neutral country, the ſentences of ſuch ſuppoſed tribunal are of no effect: Caſe of the *Fladoyen*, 1 *Robinſon*, 135. *Havelock* v. *Rockwood*, 8 *T. R.* 268. but a condemnation in the country of the ally of the complaining power is ſupported. Caſe of the *Chriſtopher*, 2 *Robinſon*, 209. *Oddy* v. *Bovil*, 2 *Eaſt*, 473. In the caſe of the *Henrick* and *Maria*, 4 *Robinſon*, 43, Sir *William Scott* ſtrongly intimated his opinion, that upon principle, a condemnation is not valid, unleſs the ſhip is brought into the country of the capturing power or its ally; but the *Britiſh* Court of Admiralty, having in ſome caſes acted upon a different principle, he ſupported a condemnation in a court of the enemy's country, of a ſhip lying in a neutral port: the ſame queſtion is now waiting for determination in the Court of Appeal.

Another ſubject in reſpect to which the proceeding is *in rem*, is the juriſdiction of the ſpiritual court with reſpect to wills, and inteſtacy with reference to perſonal eſtate; the probate of a will being neceſſary and concluſive evidence in all civil proceedings. See *Barneſley* v. *Powell*, 1 *Veſ.* 120. 284. and the caſes there cited. But where a teſtator made a codicil to his will, to take effect in a given caſe, it was properly ruled by the Maſter of the Rolls, that granting probate of the codicil was no concluſion with reſpect to the event having taken place, upon which the operation of it was to attach. *Sinclair* v. *Hone*, 6 *Veſ.* 607. The effect of the act of the eccleſiaſtical court is confined to the direct operation of it; for where the defendant claimed goods as adminiſtratrix to a woman, and the plaintiff ſhewed that he was married to her; which the defendant contended that he was eſtopped by the adminiſtration from doing, as that would not have been granted if ſuch marriage had taken place. *Holt*, Ch. Juſtice, decided the contrary, obſerving, that a matter which has been directly determined by the ſentence of the eccleſiaſtical court, cannot be gainſaid. Their ſentence is concluſive in ſuch caſes, and no evidence ſhall be admitted to prove the contrary; but that is to be underſtood only in the point directly tried, otherwiſe it is of a collateral matter, to be collected or inferred from their ſentence; as in this caſe, becauſe the adminiſtration is granted to the defendant, therefore they infer that the plaintiff was not the inteſtate's huſband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their ſentence had been not married. *Blackham's* caſe, 1 *Salk.* 290. And the ſame opinion is expreſſed by Lord *Hardwicke*, in *Baker* v. *Pritchard*, 2 *Atk.* 387. In the *King* v. *Vincent*, *Str.* 481. it was ruled that the probate of a will, while unrepealed, was concluſive evidence in ſupport of it, upon an indictment for forgery; but this doctrine was diſputed by *De Grey*, Ch. Juſtice, in the Ducheſs of *Kingſton's* caſe, and was expreſsly over-ruled by Lord *Ellenborough*, in the caſe of the *King* v. *Gibſon*, *Lancaſter* ſummer aſſizes 1802, where the priſoner was convicted and executed.

A direct ſentence in the eccleſiaſtical court, in affirmance or avoidance of a marriage, is allowed to be concluſive evidence in all civil caſes, where the marriage comes incidentally in queſtion (except in caſe of colluſion). See *Bunting's* caſe, 4 *Co.* 29. *Kenn's* caſe, 7 *Co.* 41. *Jones* v. *Bow*, *Carth.* 225. *Da Coſta* v. *Villa Real*, 2 *Str.* 691. *Clowes* v. *Bathurſt*, 2 *Str.* 960. *Meadows* v. *Ducheſs of Kingſton*, *Ambler*, 756. But in the Ducheſs of *Kingſton's* caſe, 11 *State Trials*, 201. it was decided, that a ſentence againſt a marriage, in a cauſe of juſtification was not concluſive evidence on an indictment for polygamy. The opinion of Lord Ch. Juſtice *De Grey*, upon that occaſion,

occaſion, affords the moſt inſtructive view that can be given of the effect of judicial ſentences (*a*). The following propoſitions were deduced by him, from the ſeveral caſes which had been previouſly decided. Firſt, that the judgment of a court of concurrent juriſdiction, directly upon the point, is as a plea, a bar, or as evidence concluſive between the ſame parties, upon the ſame matter directly in queſtion in another court. Secondly, that the judgment of a court of excluſive juriſdiction directly upon the point, is in the like manner concluſive upon the ſame matter, between the ſame parties coming incidentally in queſtion in another court. But neither the judgment of a concurrent or excluſive juriſdiction is evidence of any matter which came collaterally in queſtion, though within their juriſdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument by the judgment. It was alſo the opinion of the judges, that, ſuppoſing the ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion. In *Prudham* v. *Phillips*, cited *Ambler*, 763. *Harg. L. Tracts*, 456, upon the queſtion, whether fraud in obtaining ſentence in a matrimonial cauſe could be ſhewn in avoidance of the ſentence, in a collateral action, Lord Ch. Juſtice *Willes*, after much debate, took a diſtinction between the caſe of a ſtranger, who cannot come in and reverſe the judgment, and therefore muſt of neceſſity be permitted to aver that it is fraudulent, and the caſe of one who is party to the proceedings; that fraud was a matter of fact, and if uſed in obtaining judgments was a deceit on the court and hurtful to ſtrangers, who, as they could not come in to reverſe or ſet aſide the judgment, muſt of neceſſity be admitted to aver that it was fraudulent, but that a party cannot give evidence that the judgment was fraudulent, but muſt apply to the court, which pronounced the judgment to vacate it; and if both parties colluded, he ſaid, it was never known that either of them could vacate it.

In the caſe of a foreign attachment, according to the cuſtom of the city of *London*, if the regular proceedings have been had againſt the defendant, the garniſhee in whoſe hands the property has been attached, is protected by the judgment in caſe of an action brought againſt him by the original defendant, and is not required to prove the reality of the debt due to the original plaintiff, nor, as I conceive, can any evidence be allowed as to the non-exiſtence of ſuch debt. See *M'Daniel* v. *Hughes*, 3 *Eaſt*, 367.

In the caſe of *Phelps* v. *Holkar*, before the ſupreme court of *Pennſylvania*, 1 *Dallas*, 261. an attachment had iſſued to which

(*a*) See alſo Mr. *Hargrave*'s obſervations upon this ſubject. *Law Tracts*, 452.

the ſheriff returned, that he had attached one blanket, ſhewn to him as the reputed property of the defendant, upon which judgment was given by default, and an action of debt being brought on that judgment in *Pennſylvania*, the queſtion was reſerved, whether the judgment was concluſive evidence of the debt, which it was reſolved that it was not: as the attachment was a proceeding *in rem*, and ought not to be carried farther than the property attached.

I have above had occaſion to refer to the opinion of Lord *Manſfield*, in *Walker* v. *Witter*, that the judgment of foreign courts (which are coupled with *Engliſh* courts not of record) are only *prima facie* evidence, and not concluſive evidence in an action here; and in mentioning the points that have been determined, in regard to matters of prize, have cited ſeveral caſes, which ſhew it to be the eſtabliſhed law, that with reſpect to that ſubject at leaſt they are entirely concluſive. In 12 *Vin.* 87. *pl.* 5 *Anon.* the Lord Chancellor took the following diſtinction; that where a ſuit is for a debt or other thing, a ſentence in another country is not binding, but the court here muſt examine into the matter in order to form a a judgment; *contra*, where the ſuit here is in order to carry that ſentence into execution, for then the proceedings here are founded upon the ſentence, and not upon the debt. In *Burrows* v. *Jemino*, or *Temineau*, 2 *Str.* 733. 12 *Vin.* 87. the acceptor of a bill reſident at *Legborn*, who had by a ſuit there, according to the law of the place, been diſcharged from his liability, on account of the failure of the drawer, applied for and obtained an injunction in Chancery againſt a ſuit here. Lord Chancellor *King* obſerving, that the court at *Legborn* had juriſdiction of the thing and of the perſon, and that he thought he was bound by the ſentence; he thought the judgment would be a diſcharge at law, but as the other judges might be of a different opinion, he would not put the party upon the difficulty and hazard of a trial (*a*).

In *Sill* v. *Worſwick*, 1 *H. B.* 665. *Hunter* v. *Potts*, 4 *T. R.* 182. *S. C.* in error by the name of *Philips* v. *Hunter*, 2 *H. B.* 402. it was ruled that if a creditor in *England*, after a trader here has become bankrupt, attaches his property in a foreign country, he is liable for the amount to the aſſignees. Lord Ch. Juſtice *Eyre*, differed in the laſt caſe from all the other judges, and thought the

(*a*) The diſcharge by bankruptcy, or ſurrender of property in a foreign country, has ſome analogy to a foreign ſentence. With reſpect to that ſubject, it has been held that ſuch a diſcharge ſhall be valid here, with reſpect to a debt contracted in the country where the diſcharge took place. *Ballantine* v. *Golding*, *Co. B. L.* 347. 1*ſt Ed.* But not with reſpect to a debt which accrued in *England*. *Smith* v. *Buchanan*, 1 *Eaſt*, 6. If a bill of exchange is drawn in *America* payable in *England*, and diſhonoured, the debt accrues in *America*, and the drawer is diſcharged by a bankruptcy and certificate there. *Potter* v. *Brown*, 5 *Eaſt*, 125.

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decision was an improper interference with the decision of a court of competent authority. He said—"If we had the means of knowing the law of another country, we could not examine a judgment of a court in a foreign state brought before us in this manner. It is in one way only that the sentence or judgment of a court, of a foreign state is examinable in our courts, and that is when the party who claims the benefit, applies to our courts to inforce it; in which case he considered it as examinable." I do not think that the decision of the above cases could be justly regarded as a subversion of the authority due to the courts in which the attachment had taken place, for there is no inconsistency in a person who recovers a judgment which is valid and effective as affecting the immediate parties; being, under given circumstances, answerable as a trustee for the amount received (*b*).

I have sometimes heard of a contrivance to subject persons resident in *England*, to the process of the courts in *Ireland*, by serving them with a writ here, swearing generally to the service and entering an appearance, and thereupon proceeding to judgment, and bringing an action on the judgment in an *English* court. I cannot however think that the courts of this country would support such a practice upon the mere fiction, that the defendant could not aver against the record: if the Union has had the effect of giving to the records in the courts of *Ireland*, the character of records in *England*, (as to which *Vide Collins* v. *Matthew*, 5 *East*, 473.) so that the special fact cannot be shewn on a general issue of *nil debet*, I should suppose that a plea setting forth the special circumstances, with proper averments would be sufficient; or that the courts would even oppose a summary remedy, to so violent an invasion of their own prerogatives.

Mr. *Peake*, in his *Law of Evidence*, discusses with some particularity, the question, how far a verdict in a criminal prosecution should be allowed as evidence of the same facts in a civil procedure. I think it may be fairly stated as the result of the law upon this subject, that there is no authority whatever, upon which any reliance can be placed, in favour of the admissibility of such evidence. The case of *Boyle* v. *Boyle*, 3 *Mod*, 164. which is upon the face of it completely inconsistent with itself, and which is contained in a book of no reputation, can hardly claim the rank of an authority. It is said, that a woman obtained a prohibition against a cause of

(*b*) A sentence of expulsion in a college, is conclusive evidence in a question as to the right of the party to be within the garden, &c. *Rex* v. *Grunden*, *Cowp.* 315. A conviction before a magistrate is, until quashed or reversed, conclusive evidence for him in an action of trespass. *Strickland* v. *Ward*, *cor. Yates* J. 7 *T. R.* 633. *n.* Where a surcharge was confirmed by commissioners of houses, &c., on appeal it was ruled to be conclusive in trespass. *Earl of Radnor* v. *Reeve*, 2 *Bos. & Pul.* 391.

jactitation, the man having been convicted of having married her, having a former wife living;—thus a judgment which implies the invalidity of a marriage, is made an affirmance of it. All the cases in which a party having an interest in the subject of a criminal prosecution has been admitted as a witness, are in direct opposition to the principle, that the verdict on such a prosecution can be admitted as evidence, in respect of the civil right.

NUMBER XVII.

Of the Distinctions between Law and Fact, and the Effect of Usage upon the Law.

(Referred to, Vol. II. p. 152.)

In the preceding number, on the Law of Evidence, I have referred to the following note, which I had previously inserted in the view of the decisions of Lord *Mansfield*, Vol. II. 338. with respect to the distinctions between law and fact, and the effect of usage.

"There are few objects of more importance, considering the distribution of judicial authority in the *English* courts of common law, than the establishing an accurate criterion for distinguishing the boundary between questions of law, and what are called questions of fact. When the distinction is established in a particular instance, the consequence ensues, that if the question falls under the former part of the division, the grounds of determination must be judicially recognized by the court, that they are not the object of evidence, and cannot be constitutionally referred to the decision of jury: the reverse of this takes place if it belongs to the latter. In many cases the boundary is defined with sufficient accuracy; but in some there appears to be an almost inextricable confusion and difficulty; and this applies most particularly, to discussions upon the custom of merchants, a term the effect and import of which does not appear to have been accurately defined, when it is considered as a question of fact, but which is as precise as any other when considered as a question of law, according to the doctrine of Lord Chief Justice *Holt*, in the case of *Hawkins* v. *Cardy*, 1 Lord *Raym.* 130, in which the declaration stated it to be the custom of merchants, that if a bill of exchange was indorsed over for the whole or any part, the drawer was obliged to pay the sum so indorsed; and upon demurrer, it was urged, that as the plaintiff had alleged this to be part of the custom, it was well enough; but the Chief Justice answered, that this is not a particular local custom, but the common custom of merchants, of which the law takes notice; and therefore the court cannot take the custom to be

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as ſtated: and which doctrine is more diſtinctly announced by Mr. Juſtice *Foſter*, in *Edie* v. *The Eaſt India Company*, 2 *Bur.* 1216. where he ſays, the cuſtom of merchants is the general law of the kingdom, part of the common law. This principle has, however, been often departed from, and the cuſtom of merchants ſubmitted as a fact to the jury, and made the object of examination by witneſſes. A local cuſtom, the exiſtence of which is confeſſedly a matter of inquiry for the jury, is a term accurately diſtinguiſhed; the extent, nature, and requiſites of it are clearly defined, and amongſt theſe are the palpable circumſtances of its being immemorial and compulſory. But the term *cuſtom*, in the ſenſe at preſent under conſideration, ſeems to be in many caſes, not carried beyond its popular ſignification, importing frequent habit, although ſuch habit may have been merely the reſult of perſonal convenience, or of miſtaken notions of legal obligation, and although it may have been of novel introduction.

"In the common diſtribution of law and fact, the law is underſtood to be a general and univerſal rule, and the fact to be of a limited and particular nature. Whatever therefore is decided reſpecting the former, becomes properly an authority for ſucceeding determinations; and a want of uniformity in a general rule of property, or conduct is of material detriment; but the deciſion on matters of fact in one cauſe, is not, in its nature, material in the inveſtigation of another, except between the ſame parties, or thoſe ſucceeding to their rights. An exception has been ſo far allowed, that in matters of local cuſtom, a verdict between other parties is admiſſible in evidence, but then it is only regarded as one amongſt other circumſtances; upon the general aggregate of which, a jury may form their determination, the influence of it is not previouſly defined; and it is very far from being conſidered as imperative on the judgment of another jury, or as precluding other ſources of examination; and to be introduced at all, it muſt be verified as any other record. But an opinion of a jury has been exalted to a much higher rank than this, in the caſe of the cuſtom of merchants, and almoſt placed on a level with legiſlative authority. For in the caſe of *Lickbarrow* v. *Maſon*, which underwent as much inveſtigation as almoſt any mercantile cauſe that ever occurred, the judges of the King's Bench having given a deciſion, that the indorſement of a bill of lading defeated the right of ſtopping *in tranſitu*, which deciſion was reverſed in the Exchequer Chamber; and afterwards the judges having very much differed in their opinions before the Houſe of Lords, it being treated all along as queſtion of law, the knot, inſtead of being unravelled, was cut in two, by referring the caſe to a jury as a queſtion of fact; the jury found a verdict, that by the cuſtom of merchants the indorſement

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barred the right of the ſhipper: and in a ſubſequent caſe of *Hunter* v. *Baring*, cited 1 *Boſ. & Pul.* 567. evidence was refuſed reſpecting the negotiability of a bill of lading, it having been admitted on record in the former caſe, and contrary to the rule and practice reſpecting local cuſtoms, no evidence was given of the former verdict, but it was judicially recognized by the court, and the rule of law has been ſince conſidered as eſtabliſhed.

"That twelve farmers in *Angleſea* or *Merionethſhire*, ſhould concluſively ſettle a general rule of property, is a doctrine which would not be thought to reflect much credit on the *Engliſh* law: but although theſe mercantile queſtions are moſt frequently decided by a ſpecial jury at *Guildhall*, the law and conſtitution do not recognize any difference founded upon that diſtinction. Without entertaining an idea in the ſlighteſt degree derogatory to the importance and value of juries, I cannot but think it a manifeſt inconvenience to refer to that tribunal the deciſion upon general rules; their opinion is neceſſarily inſtantaneous, and the reaſons on which it is founded are not ſubject to public inveſtigation, and being a fleeting accidental body, the deciſions thus formed by them are much more likely to be erroneous, conſidered as the foundation of general rules, than opinions formed upon accurate and mature deliberation, by perſons profeſſionally and habitually converſant with the ſubjects of their enquiry, and ſubmitting to public notoriety the reaſons, and principles, and authorities, upon which thoſe opinions are founded.

"With reſpect to queſtions connected with the conſtruction of written inſtruments, it muſt be admitted, that a true conſtruction muſt be founded upon the words conſidered with relation to the ſubject matter. Whatever, therefore, explains and illuſtrates a ſubject to which an inſtrument refers, is properly admiſſible, to direct the judgment as to the effect and object of the inſtrument itſelf. Therefore, where words are uſed which are appropriate to a particular branch of trade, or which in ſome trade have a known conſtant familiar import, though perhaps in ſome degree differing from their ordinary application, it ſeems reaſonable that the import ſo eſtabliſhed ſhould be ſhewn, ſo that a judgment may be exerciſed from the nature of the ſubject and context of the inſtrument whether the words were, or were not, intended to be uſed, according to ſuch appropriate ſignification: but where words are, in themſelves, free from ambiguity, and no eſtabliſhed technical import has been attached to them, nothing is more contrary to the general ſpirit of the law, than to ſettle their conſtruction by the opinions of witneſſes.

"In every caſe where a queſtion turns upon the degree of diligence

gence or neglect, attached to a particular tranſaction, the uſual mode and habits of buſineſs are properly admiſſible, in order to lead the judgment to an accurate concluſion upon the particular caſe, and the jury are the proper judges of the effect. But all theſe caſes are very different from examining witneſſes to prove, or referring to juries to eſtabliſh, a general rule of property.

"In regard to many points upon the ſettlement laws, the deciſions upon oppoſite ſides approach ſo near, or are ſo contradictory, that it is impoſſible to reconcile them with any common principle. This difficulty has, in ſome caſes, induced the court to transfer the deciſion of the point from themſelves as a queſtion of law, and to leave it for the ſeſſions as a queſtion of fact, a courſe of proceeding which is very conducive to the increaſe of litigation. If a queſtion is, in its nature, a queſtion of law, the difficulties attached to it cannot be legitimate reaſon for converting it into a queſtion of fact. A regular ſeries of adjudications, embracing a common and conſiſtent principle, may ſometimes be properly adhered to, although the introduction of the principle may appear to have been founded upon erroneous reaſoning, becauſe, by ſuch courſe, that certainty which is a primary object of the law, is materially ſecured. But where claſhing and contradictory determinations, leave the ſubject more indefinite than if there had been no determination at all, the moſt beneficial courſe would ſeem to be a diſregard of the effect of ſuch determinations; an examination of the ſubject in its original principles, commencing with known eſtabliſhed data, and an enunciation of the reſult, that would leave to the inferior court little more than the application of particular evidence, to a definite and unambiguous propoſition."

The caſe of *The King* v. *Steventon*, 2 *Eaſt*, 362. may call for ſome obſervations connected with the preceding diſcuſſion.

The queſtion aroſe as to the legality of a ſummons, iſſuing from the office of the Solicitor of Exciſe, inſtead of being ſigned by the commiſſioners, and it may be taken for granted, ſo far as relates to the preſent purpoſe, that, independent of the authority of uſage, ſuch a ſummons was inſufficient, but the uſage in fact having been to iſſue ſuch ſummonſes, Lord *Kenyon* ſaid, "that the court ought not to ſuffer the queſtion to be agitated, Whether a ſummons which has iſſued from theſe commiſſioners in the uſual courſe of practice, and in conformity with the practice of the ſuperior courts is regular? Subpœnas are conſtantly iſſued in this manner; they are ſent down blank into the country, and there filled up: and in the ſame manner are jurors ſummoned by the ſheriff to attend the aſſizes, without his ſignature to the proceſs. I am afraid of

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ſhaking the practice of all the courts and judicial officers in the kingdom."

Upon this caſe it may be obſerved, that the ſupport of one abuſe by merely ſhewing the exiſtence of another, is not a very ligitimate courſe of reaſoning; in the caſe of ſubpœnas, the principle of convenience will perhaps induce the courts to ſuſtain their own long continued irregularity; but I think Lord *Kenyon* would have rather heſitated at admitting the general propoſition, that whatever was allowed in the ſuperior courts, was therefore allowable in every inferior juriſdiction. The ſheriff's warrants for ſummoning jurors iſſue under the ſeal of the office, and under the immediate authority of the under ſheriff, whom the law recognizes as the legal efficient officer; the immediate ſummonſes are under the ſignature of the ſummoning officer; alſo a known authorized character, and perhaps in theſe two inſtances, the practice may have the antiquity which amounts to common law, but in the caſe of commiſſioners of exciſe, his lordſhip's judgment is certainly not conſiſtent with the principles which he laid down with ſuch diſtinguiſhed ability in the caſe of *The King* v. *Eriſwell*. He there ſaid, the propoſition ſtated was, that the ſeſſions having in general received ſuch evidence as that in queſtion, their uſage creates a rule by which the courts are to proceed. I confeſs (ſaid he) there is ſomething of novelty in that argument, which refers thoſe whom the conſtitution of the juriſprudence of this country hath inveſted with the power of correcting the errors of juſtices of peace, to the very practice of thoſe perſons to learn the rules of evidence by which they are to proceed. I remember the caſe of *Baldwin & Ux.* v. *Blackmore*, reported in 1 *Bur.* 593. and of which I have a MS. note, and a full memory, where juſtices of the peace had committed a man and his wife, for returning to a pariſh from which they had been removed by an order. The action was brought by the huſband and wife, on the ground that the wife had been improperly committed; the caſe was twice argued: and the uſage of committing femes covert was inſiſted upon; and it rather appeared at firſt, that ſome part of the bench were inclined to give countenance to ſuch an uſage; but I well remember that Mr. Juſtice *Foſter* treated the argument with more indignation, than is expreſſed by Sir *James Burrow* in his account of the caſe. I perfectly well recollect that learned judge's ſaying, "that he had heard *communis error facit jus*, but he hoped he ſhould never hear that rule inſiſted upon, to ſet up a miſconception of the law, in deſtruction of the law. I ſhould have diſdained to ſay any thing on this poſition, unleſs it had received the appearance of ſome

countenance

countenance in the caſes I have mentioned, and in the diſcuſſion of this caſe. It is the whole ground of the opinions hinted at in the other caſes. The practice I know varies according to the uſage of each county where the ſeſſions are held; and I ſhould as ſoon reſort to the uſage of every pariſh in the kingdom, on a queſtion concerning the rateability of perſonal eſtate. But I will not enter more into this point, as I am clear it would be moſt dangerous to adopt it. The miſtakes of judges, provided they became univerſal, would, according to that doctrine, become rules of law. An uſage commencing at ſooneſt, ſince 13 & 14 *Chas. II.* (*a*). contrary to law, and working injuſtice every day it was perſiſted in, would ſuperſede the law." Theſe were manly ſentiments, and pronounced in the true ſpirit of judicial wiſdom, but how can they be reconciled with the ſentiment in the *King* v. *Steventon*, that the court ought not to ſuffer the queſtion reſpecting the legality of a uſage, which muſt have commenced at the earlieſt, ſince the 12th of *Chas.* II. to be agitated? Although ſome ſtreſs is laid in the *King* v. *Eriſwell*, upon the nature of the ſubject to which the obſervation is referred, it is manifeſt that the main tendency of the obſervations was general.

In the great queſtion of general warrants, it was contended that the uſage eſtabliſhed a right. Lord *Mansfield*, who in ſome caſes, and particularly in the queſtion reſpecting the rating of perſonal property, gave very undue influence to particular uſage, ſaid,—How do the ordinary magiſtrates uſually act in ſuch caſes? It is not contended that they can iſſue ſuch a warrant: if the ſecretaries act in that capacity, the law muſt be the ſame, unleſs a different reaſon can be aſſigned. It is ſaid, that uſage will juſtify it; and it appears that the ſame form ſubſiſted at the revolution, and has continued ever ſince. Uſage has great weight: but will not hold againſt the clear and ſolid principles of the law; unleſs the overturning it would be very ill conſequence indeed. But where no great inconvenience can ariſe in reſpect of what is paſt, and the conſequence with regard to futurity may be very great; there is no reliance to be had upon ſuch an uſage. Beſides, uſage muſt be general and allowed, *uſitata et approbata*. But this has been an uſage of only one office and officer, againſt the practice of all other conſervators of the peace.—*Wilmot*, J. I have not the leaſt doubt, nor ever had, that theſe warrants are illegal and void.—*Yates*, J. So totally bad that an uſage, even from the foundation of *Rome* itſelf would not make them good. *Money* v. *Leach* 1 *Bl. Rep.* 555. In the caſe of *Magdalen College*, 11 *Rep.* 68. the

(*a*) The year after the exciſe act.

arguments

arguments adduced in favour of eccleſiaſtical leaſes, that ſeveral ſimilar leaſes had been granted ſince the diſabling ſtatute, by the advice of men learned in the law, was anſwered by the Juſtices *Coke*, *Croke*; *Dodderidge*, and *Haughton*; that the number of leaſes was more *ex conſuetudine clericorum*, who imitated precedents of leaſes made before the ſtatute, than of any ſage advice of men learned in the law; and ſecondly, that *multitudo errantium non parit errori patrocinium.*

I do not ſtop to inquire whether ſuch ſummonſes as were iſſued in the caſe of *Steventon*, were independent of uſage good or bad; the court laid that queſtion aſide, and decided wholly upon the uſage. Neither is it material to inquire, whether any inconvenience could reſult from giving to ſuch a practice a poſitive ſanction on the one hand, or from conforming to the general principles of law on the other. The practice, if requiſite, might be fully provided for by the legiſlature. In the particular caſe, it is probable that the parties who acted certainly with improper intentions, but as certainly were entitled to the benefit of all exceptions founded upon law, were miſled by their reliance that a blunder and irregularity, proceeding from the negligence of official practice, and never brought under judicial notice, would not be raiſed into a legal principle merely from the length of time, for which it had been improperly continued. The objection which I wiſh to urge, goes to the foundation of the argument itſelf, that what is wrong to day becomes in its repetition right to morrow, and if one day will not do, how many will? For there is no ſtatute of limitations. It is not uncommon to adduce an argument in favour of the ancient and eſtabliſhed law and conſtitution of the country, by comparing it to a grand and venerable fabric, but ſurely the effect of the compariſon will not be improved, by extending the veneration to the duſt and cobwebs.

In the caſe *ex parte Leiceſter*, 6 *Veſ.* 429, the preſent Lord Chancellor advanced a poſition which is in direct oppoſition to the principles that I am endeavouring to maintain. He ſaid, that where a practice has prevailed for a ſeries of years, contrary to the terms of an order of the court, and ſometimes contrary to an act of parliament, it is more conſiſtent to ſuppoſe ſome ground appeared to former judges, upon which it might be rendered conſiſtent with the practice. I can never advert to expreſſions of this deſcription without proteſting my diſſent; and I think that even the immenſe difference of ſituation, between the higheſt depoſitary of public juſtice, and the moſt obſcure individual can never give a legitimate ſanction to the doctrine, that an habitual diſobedience or violation of the law, ſhall be allowed as ſuperior authority, to the poſitive and unequivocal mandate of the law itſelf; this ar-

gument is perfectly collateral to that, which conſiders uſage as the beſt expoſitor of a rule attended with ambiguity, for the propoſition which is objected to, aſſumes the fact of the exiſting practice, being contrary to the legal authority upon the ſubject, it takes it for granted that the law is one way, and that ſome good reaſon has been found for ſetting up a different authority, as ſuperior to the law on the other.

NUMBER

NUMBER XVIII. (a)

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Of Miſtakes of Law.

(Referred to Vol. I. p. 306. and *ante*, p. 324. of this Volume.)

PART I.

Preliminary Obſervations.

IN the *Eſſays*, which I lately ſubmitted to the public, on the action for money had and received, and on bills of exchange, I had occaſion to advert to the queſtions, Whether money paid merely under a miſtaken idea of legal obligation was ſubject to repetition? and Whether an indorſer of a bill of exchange, knowing the facts by which his obligation was diſcharged in point of law, but ignorant of the legal conſequence of them, was bound by a ſubſequent promiſe of payment? Upon the firſt of theſe queſtions, I extracted a very learned and judicious argument of *Vinnius*, in ſupport of the affirmative propoſition, and ſubjoined ſome caſes that had occurred in the *Engliſh* courts of juſtice, which appeared to be a confirmation and adoption of the ſame doctrine. Upon the ſecond queſtion, it appeared (contrary to ſome deciſions which had occurred) to be a neceſſary corollary of the ſolution propoſed of the firſt, that the promiſe was not obligatory.

Since that period, a determination has taken place in the Court of King's Bench, upon the firſt queſtion, oppoſite to the concluſion, which had appeared to me to be beſt ſupported by law and reaſon: and, very lately, the learned Chief Juſtice of the ſame court has, at *Niſi Prius*, given a judicial opinion oppoſite to that which I had adopted on the ſecond.

(a) The preſent number, which was written in 1803, was intended to have formed a ſeparate publication, and is mentioned with that view in a note to p. 306. of the preceding volume; but as the diſcuſſions in Part IV. c. 3. ſ. 1. and in the Appendix to that ſection, *ante*, No. 16. ſ. 14. have ſome relation to the ſubject, I have ſince decided upon inſerting it as a part of the Appendix.

Perhaps it may be thought, that I ſhould act more conſiſtently with the propriety of my own ſituation, by bowing with deference to the authority of theſe determinations, than by renewing a diſcuſſion which has received its concluſion from thoſe whoſe opinions are not only to be reſpected for their wiſdom and talents, but alſo to be acted upon and acceded to, as terminating, by their authority, the controverſy of a diſputable ſubject.

I have however always thought that a candid and diſpaſſionate examination of judicial opinions was perfectly conſiſtent with a proper deference to the rank and character of thoſe, by whom they were entertained, and that ſuch examination is often attended with public and profeſſional utility: and I truſt my unaffected perſonal reſpect towards the noble and learned magiſtrate, whoſe ſentiments I have taken the liberty of bringing into diſcuſſion, will be a ſecurity againſt my juſtly incurring the imputation of preſumption, or of improper tenacity of opinion, in renewing the conſideration of theſe queſtions.

It muſt certainly be admitted, that the firſt of theſe ſubjects was not, when preſented to the Court of King's Bench, conſidered as poſſeſſing the ſame importance which has been aſcribed to it by the followers of the *Roman* law, or diſcuſſed with that attention which it had before received from the celebrated commentator already mentioned, and the ſtill more celebrated magiſtrate whoſe diſſertation is about to be ſubjoined; that the determination, as reported, was founded on the want of an adequate precedent in ſupport of the right of repetition, and on the authority of an obſervation which I conceive will appear in the ſequel to have certainly not been neceſſary to the judgment which it accompanied, and probably not to have been correctly and conſiderately applied; and that ſo far was the queſtion from leading to an expoſition of the great and general principles which are connected with it, that it was diſpoſed of in a ſummary manner, without any argument or deliberation.

My acquaintance with the writings of *D'Agueſſeau* has only commenced ſince the appearance of the before mentioned Eſſays, although I had for many years been anxious for the acquiſition of them. His admirable pieces of judicial eloquence have ſince that time occupied a conſiderable portion of my time and attention, and the tranſlation of ſeveral of them has greatly contributed to my gratification. His pleadings appear to compriſe a moſt ſtriking union of profound learning, logical accuracy, and felicity of diction. They are not, as may be ſuppoſed from the title, the arguments of a counſel for his party, but the advice of an aſſeſſor to the court. The deciſions of the parliament of *Paris* were given in writing, without any public declaration of their grounds and reaſons,

reaſons, but were preceded by a very full expoſition, publicly made by the Advocate General, of the facts, the arguments of the parties, and the legal principles of deciſion; and it is the execution of this important duty, which conſtitutes the ſubject of the pleadings above referred to.

It would afford me great ſatisfaction to communicate to my countrymen, ſo much of the excellence of theſe pleadings, as I am enabled to preſerve in the tranſlation: and my intentions and wiſhes upon that ſubject are only ſuſpended by the intimation of thoſe beſt qualified to form an accurate judgment upon the ſubject, that the uſual reception of publications, tending to illuſtrate the general principles of juriſprudence, or to exhibit the particular application of thoſe principles in the practice of foreign countries, is not ſufficiently favourable *to afford an adequate expectation of ſecurity from loſs*, or to reconcile incurring the neceſſary expence, with the dictates of common prudence (*a*).

The father of *M. D'Agueſſeau*, (of whoſe character a delineation of particular intereſt is preſerved from the maſterly hand of the ſon,) having filled with diſtinguiſhed virtue and reputation, ſeveral of the moſt important public ſituations in *France*; upon the inſtitution of the office of a third Advocate General, in the parliament of *Paris*, recommended his ſon, then only of the age of 21, to the appointment, and *Louis* XIV., in acceding to the requeſt, declared, that he was ſo well acquainted with the father, as to be ſure that he would not deceive him even in the teſtimony which he gave in favour of his ſon. How far this confidence was merited, and juſtified, is evident to all who have the ſlighteſt acquaintance with the writings and hiſtory of *D'Agueſſeau*. It is obſerved in the ſummary of his life prefixed to his works, that he appeared at firſt with ſo much eclat, that the celebrated *Denis Talen*, then *preſident à mortier*, declared he ſhould wiſh to finiſh as that young man had begun. It is added, that "he was equal to a multitude of affairs, that he treated them all fundamentally, and frequently diſcovered laws, pieces, and deciſive reaſonings, which had eſcaped the advocates of the parties. He united to erudition, order, and clearneſs of ideas, the force of reaſon and the moſt brilliant eloquence." The truth of this teſtimony does not reſt upon the partiality of a kindred biographer, but upon the exiſtence of the productions to which it is applied. He continued in this ſituation until the age of thirty-two, when upon the recommendation of the preſident *Harlay*, himſelf one of the moſt eminent

(*a*) In the ſequel of the preſent volume, I ſhall embrace the opportunity of inſerting ſome ſpecimens of theſe pleadings; but I do not think it material to alter the preceding ſentence.

juriſts of the country, he was promoted to the office of Procureur General, to which that of Advocate General is in ſome degree a deputation, but an office the functions of which were of a more recluſe nature than thoſe of Advocate General; more intimately connected with the details of adminiſtration, requiring the exerciſe of learning, and talent, in the compoſition of written arguments, but not calling forth the application of oral eloquence, except upon the opening of the ſeſſions of juſtice; upon which occaſion the Procureur General, in rotation with the ſenior Advocate General, delivered an addreſs to the judges of the parliament, reſpecting the duties moſt entitled to their attention, and the failings againſt which it was moſt important to awaken their caution. From this office he paſſed to that of Chancellor, the grand depoſitary of juſtice and legiſlation, in the year 1717, upon the appointment of the regent Duke of *Orleans*, being then of the age of 39. In the earlier years of his filling this ſituation, he was twice baniſhed to his eſtate; the firſt time, in conſequence of his ſteady oppoſition to the financial projects of Law; the ſecond, for reſiſting an undue precedence being allowed to cardinal *Dubois*, contrary to the uſage of the kingdom; but being reſtored to his dignity, he continued in poſſeſſion of it until the day on which he completed his 80th year, when he prevailed on the king to accept his reſignation, which in leſs than a year was followed by his death.

His varied excellencies, not only in the ſcience of juriſprudence, but in every department of polite literature, and more eſpecially in his public and private conduct, will beſt appear from the collection conſiſting of 13 large volumes, 4to. which has been made ſince his death, of his productions in the courſe of his official duty, and his domeſtic and familiar intercourſe.

The diſſertation which theſe remarks are intended to introduce, is perhaps leſs calculated than any other article in the collection, to afford a ſpecimen of his general ſtyle and manner. It appears to have been compoſed for his own ſatisfaction, in forming a concluſion upon the important ſubject which it involves, and the circumſtance of its not being deſigned for publication manifeſtly appears from its being in two different languages. It begins in *French*, afterwards *French* and *Latin* are intermixed, and laſtly, above half the diſſertation is in *Latin*. The writer appears to have ſtudiouſly confined himſelf to a ſtrict and logical diſcuſſion, a quality which is equally conſpicuous in his other numerous productions, but is in general accompanied by the finer beauties of compoſition, which, in the preſent inſtance, ſeem to have been ſtudiouſly avoided.

Although it is evident, that the diſſertation is not clothed in a language

language intended to meet the public eye, it is no leſs manifeſt that the courſe of argument is perfect and complete, and that the concluſions are the reſult of a full and comprehenſive examination of the ſubject.

The grand principle upon which the diſſertation depends, is the diſtinction between the effect of ignorance of the law, as it regards the violation of a public duty, and as it only concerns the miſtake of a private right; and the conſequence deduced from that principle is, that although ſuch ignorance can afford no excuſe in the firſt caſe, it does not in the laſt operate as a ſufficient cauſe for diveſting the property of one man, and conferring it on another.

It muſt be acknowledged that ſome of the reaſonings by which this diſtinction is illuſtrated, have very much the air of metaphyſical ſubtilty, and, taken abſtractedly, would be inſufficient to eſtabliſh the diſtinction contended for; but the inadequacy of particular reaſons cannot affect the propriety of the general concluſion, if that concluſion is ſupported by other reaſons, which are in themſelves adequate and ſufficient.

The diſpute upon this ſubject, which has more than moſt others agitated the great leaders of the ſcience of juriſprudence, aroſe not ſo much from the nature of the queſtion conſidered, as depending upon the mere rules of reaſon and juſtice, as from the difficulty of reconciling different texts in the *Roman* law, which appear to lead to oppoſite concluſions. The text which places the greateſt difficulty in the way of thoſe who maintain with *D'Agueſſeau*, the doctrine of a right of repetition in caſes of money paid, upon no other conſideration than a miſtaken notion of legal obligation (the ſuppoſition excluding any moral obligation), is a poſitive law of the Emperors *Diocleſian*, and *Maximilian*, which appears indefinitely to negative the right. But the laws upon which the oppoſite opinion is founded, are thoſe which moſt immediately reſult from, and are declaratory of the grand principles of juſtice, and even if the argument ſhould be unſatisfactory in reconciling the apparent contradiction, even if it were admitted that the poſitive deciſion of the Emperors was, to the extent of its authority, an unequivocal and univerſal declaration upon the ſubject in queſtion; if it is alſo eſtabliſhed on the other hand, that the oppoſite propoſition is the fair and natural reſult of thoſe other principles which have been juſt referred to, there will be no difficulty in deciding which is entitled to the preference, from thoſe who would deduce their juridical opinions from the laws of ancient *Rome*, not as they are the authoritative mandates of Princes and Emperors, but as they are to be regarded amongſt the maſter pieces of human wiſdom, as they are the deliberate opinions of

men, poſſeſſing the higheſt and beſt cultivated talents, applied with aſſiduity to the ſyſtematic cultivation of juridical ſcience, and attentively regarding the relation of every individual queſtion to the great whole, of which it conſtitutes a part. It is this quality that has recommended the adoption of the general ſyſtem to poſterity, and drawn from the illuſtrious chancellor, to whoſe memory I have offered an imperfect tribute of reſpect, the following panegyric, in one of his addreſſes to the parliament of *Paris*, inculcating the neceſſity of an extenſive cultivation of legal ſcience. "One book which ſcience offers at once to the magiſtrate, developes without difficulty the firſt principles, and laſt conſequences of natural law;—the work of a people whom heaven ſeems to have formed for the purpoſe of command,—every thing there breathes that height of wiſdom, that depth of good ſenſe, and, to ſay all in one word, that ſpirit of legiſlation which was the proper and ſingular character of the maſters of the world. As if the grand deſtinies of *Rome* were not yet accompliſhed, ſhe reigns throughout the earth by her reaſon, after ceaſing to reign by her authority. It may be truly ſaid, that juſtice never fully unveiled her myſteries except to the *Roman* juriſts. Legiſlators rather than juriſts, private individuals in the obſcurity of retirement, have by the ſuperiority of their intellect, merited to give laws to all poſterity;—laws equally extenſive and durable. All nations yet appeal to them, and all receive from them the anſwers of an eternal truth. It is little for them to have interpreted the law of the twelve tables, and the edict of the pretor; they are the ſureſt interpreters of our own peculiar laws; they lend as it were their ſpirit to our uſages, their reaſon to our cuſtoms; and, by the principles which they give us, they ſerve as our guides even when we walk in a road, which was unknown to themſelves."

If therefore it is manifeſt, that a particular concluſion upon a general and moſt extenſive queſtion, is plainly deduced from the maxims which ſuch men as theſe have laid down, as the firſt principles of juſtice; if thoſe maxims are, in themſelves, the reſult of that common reaſon which is given to all men, and, to be aſſented to, require only to be propoſed; if the immediate queſtion is one which every man, ſpeaking from the ordinary dictates of natural juſtice, (independently of the influence of technical ſcience,) muſt anſwer in the affirmative; if ſuch is the neceſſary conſequence from the opinions of *Papinian*, juſtly ſtiled in the treatiſe before us, *Romanæ juriſprudentiæ viva vox et oraculum*, it will be of ſmall importance to thoſe who conſult the deciſions of that juriſprudence, with a view to be aſſiſted by their wiſdom, and not to offer a blind obedience to their authority, whether a contrary

trary doctrine may have had the preference, as reſulting from the legiſlative authority of individuals, who, without regard to their power to convince, were entitled to command.

If it is ſaid, that the diſcuſſion, however intereſting to a foreigner, to the inhabitant of a country, acknowledging the *Roman* law as the baſis of its own particular juriſprudence, however ſatisfactory in its reſult, as applicable to the particular doctrines, or even the general principles of that law, is immaterial to the *Engliſh* lawyer; that the queſtion for *his* diſcuſſion, is only Whether there is any precedent in ſupport of the aſſerted right of action? I might anſwer in the language of Lord *Mansfield*, in the paſſage which I have ſelected as my firſt citation in a former publication, wherein I endeavoured to introduce the ſtudent to a knowledge of his judicial character: "The law of *England* would be a ſtrange ſcience, indeed, if it were decided by precedents only. Precedents only ſerve to illuſtrate principles, and to give them a fixed authority. But the law of *England*, which is excluſive of poſitive law, enacted by ſtatute, depends upon principles;" and to a ſimilar obſervation, in another caſe, that "the law does not conſiſt in particular caſes, but in general principles which run through the caſes and govern the deciſion of them." I might refer to the great diſcuſſion upon the ſubject of literary property; to the deciſions upon the legality of wages, and of contracts not expreſsly prohibited, to the doctrine eſtabliſhed in the recent caſe of *Paſley* v. *Truman*, and its qualification in *Haycraft* v. *Creaſy*, both diſcuſſed with much elaborate reaſoning, as founded upon the principles of natural juſtice, but both included in the ſhort ſentence of the *Roman* law: *Conſilii non fraudulenti nulla obligatio eſt, cæterum ſi dolus et calliditas interceſſit, de dolo actio competit.* But the moſt curſory reading of the deciſions of the *Engliſh* law, muſt lead to the conviction of how great an influence the principles of natural reaſon and natural juſtice (deſtitute as they are of the advantage of being regularly embodied into a connected ſyſtem) have in its adminiſtration; and though the precedents of reſorting to foreign aſſiſtance, for the expoſition and elucidation of theſe principles are not very numerous, they are abundantly ſufficient to manifeſt its utility.

Though the truth of this general propoſition ſeems almoſt too obvious to require confirmation, I do not think it unappoſite to refer particularly to the caſes of *Coggs* v. *Barnard*, of *Ryal* v. *Rowles*, and of *Ricord* v. *Bettenham*. 3 *Bur.* 1734. 1 *Bl.* 563. upon the queſtion, Whether the right acquired by a captor, under a ranſom bill, was loſt by the death of the hoſtage? in which the whole diſcuſſion turned upon the authorities of foreign juriſts, and was

finally decided upon the result of inquiries made from living lawyers in *France* and *Holland*; to *Cornu*, and *Blackburne*, (*Doug.* 641.) in which the present Chief Justice, at a very early period of his eminent professional career, relied upon the same course of reasoning, and supported his arguments not only by the writings of *Valin* and *Grotius*, but upon the principles involved in an ancient controversy between the *Thebans* and *Thessalians*, as stated by *Quinctilian*, and in the decision of which the sentiment of *Grotius* was regarded by the court as a strong authority in support of their judicial opinion; to *Robinson* and *Bland*, 3 *Bur.* 1077. 1 *Blackstone*, 234. 256; to *Holman* and *Johnson*, *Cowp.* 341. in which the effect of a contract entered into in a foreign country, was principally referred to the sentiments of *Huber*, and more especially to the case of *Luke* v. *Lyde*, in which Lord *Mansfield*, in order to form his judgment upon a question respecting the apportionment of freight, intimated that he had been desirous of reserving a case, in order to settle the point more deliberately, solemnly, and notoriously, and especially as the maritime law is not the law of a particular country, but the general law of nations: *non erit alia lex Rome alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit.*

It is indeed observable, that the cases in which recourse has been had to this foreign assistance, have generally been looked up to as cases of distinguished excellence and pre-eminent authority; but from the rarity of their occurrence it might almost be supposed, that the propriety of resorting to such assistance was temporary and occasional; that the works in which it is to be found were only to be opened at distinct intervals and by privileged persons, that the doctrines delivered upon them were to be received and cherished as oracular communications, and that the books were immediately to be closed, until the recurrence of the hallowed period, when the same solemnity might be justly warranted.

It is however certain, that the rational jurisprudence of this country received its greatest and most valuable accessions, during the presidency of Lord *Mansfield*; that the mercantile law, previous to his appointment, had nothing of systematic regularity, nothing of scientific excellence; and that under his auspices it has been elevated to a degree of perfection, which is the admiration of *Europe*. If it is inquired how that elevation was attained? several of the cases which have been just referred to, will assist in forming the answer. He resorted for information to all the sources in which he conceived it was to be found; he availed himself of the assistance of writers in other countries, who had discussed the subjects of his examination with that order and regularity, which

is attended with the peculiar advantage of regarding particular queſtions, not as they are inſulated and detached, but as they form, with their connections and dependences, the coherent and united parts of a general whole. While the advantage which has reſulted to the community, from this mode of conducting judicial inquiries, is generally acknowledged, there can be no reaſon why a purſuit of the ſame courſe of inveſtigation ſhould be diſcouraged; while the particular precedents reſulting from theſe inquiries are followed with admiration and reſpect, the general precedent which ſanctions the ſame line of proceeding, which evinces the propriety of ſeeking for uſeful aſſiſtance wherever it may be met with, is too important to be treated with neglect or diſregard. The original ſources of information are not exhauſted, the power of reſorting to theſe ſources is not annihilated; and if a court ſhould admit its willingneſs to aſſent to a given propoſition, provided the ſame, or another court had given it their ſanction, the day, the year, or the century before, why ſhould they deprive themſelves of the liberty which they allow to their predeceſſors, of deducing their opinions from the principles of juridical reaſon, and aſſiſting themſelves in that deduction by the previous inquiries of others, whoſe ability and induſtry entitle them to reſpect, without requiring an implicit deference to their concluſions? Every thing which now is precedent originally was reaſoning: although the benefits of legal certainty, frequently warrant and require an acquieſcence in the authority of the precedent, whilſt the mind withholds its aſſent to the reaſoning upon which it is founded. I ſhall hazard a few obſervations in the ſequel, upon the extent to which this principle may be juſtly and uſefully applied; my preſent object is chiefly to obviate the rejection of any doctrine which may, upon an inveſtigation of principles, be found to be uſeful and correct, upon the mere ground of there being no ſufficient precedent to warrant it. The precedents of eſtabliſhing ſuch doctrines are ſo numerous, that I may appear to have been undertaking a work of ſupererogation in defending its propriety; but though a mere aſſent to the rectitude of this principle is ſufficiently general to ſuperſede the neceſſity of proving it, the practical adoption of it is ſufficiently rare to juſtify the propriety of enforcing it. Whatever courſe of reaſoning may form a legitimate ground for the determinations of the bench, muſt alſo be a legitimate foundation for the arguments of the bar, as the nature and eſſence of theſe conſiſt in ſubmitting to the attention of the bench, the topics which appear to warrant a determination in favour of the client: and truth, juſtice, and reaſon, muſt neceſſarily retain their inherent characteriſtics, by whomſoever they may be accidentally propounded

pounded and enforced; but though this propoſition, like the former, ſcarcely requires the aſſiſtance of argument to eſtabliſh its propriety, it, like the former, is rather ſupported by theoretical aſſent than by practical reception. Numerous as the exceptions to this obſervation unqueſtionably are, it cannot be denied that it is too faſhionable to ſneer at a deviation from the beaten track of practical authority, as the reſult of pedantry and oſtentation; but although, limiting the range of profeſſional arguments to *Impey's Practice*, and the *Index* to the *Term Reports*, might poſſibly be found to diminiſh the trouble, without detracting from the profits of individuals, the majority of the profeſſion would aſſuredly be unwilling to confine themſelves within ſuch narrow trammels.

But if there is any ſubject to which the doctrine of an univerſality of principle peculiarly applies, it is that of reclaiming money unduly paid; not only upon the ground that there is no ſubject in its nature, more wholly referrible to the general rules of natural juſtice, as diſtinct from the laws founded upon local habit or municipal inſtitution, but alſo upon the more favourite ground of precedent itſelf. It will be generally agreed that the ſyſtem of law upon this ſubject, as adminiſtered in *England*, is chiefly to be deduced from the determinations of Lord *Mansfield*, and that the few caſes reſpecting it of an earlier date are not of ſufficient importance to form any regular ſyſtem. But Lord *Mansfield*'s own views upon the ſubject are peculiarly referrible to the principles of univerſal juriſprudence, as illuſtrated and embodied in the *Roman* law, and the whole ſeries of his conduct reſpecting it is a continued precedent of his recurrence to thoſe principles. In the leading caſe of *Moſes* v. *Macfarlane*, in which he embraced the earlieſt opportunity that occurred to him, of giving an expoſition of the grounds and nature of the action for money had and received, he enters diffuſely into the general doctrine reſpecting it, and ſtates ſeveral principles which have ever ſince been looked up to as the ſtandard of authority (even by thoſe who think that in the particular application of theſe principles, he did not allow ſufficient conſequence to others by which they ought properly to have been reſtricted and controuled). But it will ſcarcely be contended that he found the materials of his expoſition in any preceding volume of *Reports*; whereas a very ſlight compariſon will evince the ſource of it to have been the juridical wiſdom of ancient *Rome*.

This kind of equitable action to recover money, which ought not in juſtice to be kept, is very beneficial, and therefore much encouraged. It is only for money which, ex æquo et bono, the defendant ought to refund.

Hæc condictio ex bono et æquo introducta, quod alterius apud alterium ſine cauſa deprehenditur, revocari conſuevit. l. 66. ff. Lib. 12. Tit. 6. de Cond. Indeb.

It does not lie for money paid by the plaintiff, which is demanded of him as payable in point of honour and honeſty, though it could not have been recovered from him by any courſe of law.

Naturales obligationes non eo ſolo æſtimantur, ſi actio aliqua earum nomine competit: verumetiam eo ſi ſoluta pecunia repeti non poſſit. ff. Lib. 44. Tit. 7. de Oblig. et Actio. l. 10. Lib. 46. Tit. 1. de fide juſſoribus, l. 16. § 3.

Naturaliter etiam ſervus obligatur, et ideo ſi quis ejus nomine ſolvat, vel ipſe manumiſſus ex peculio, repeti non poterit. l. 13. de Condictione Indebiti. ff. 12. Tit. 6.

Naturale autem debitum in hac cauſa pro vero debito habetur, eoque etſi exigi non poteſt; ſolutum tamen non repetitur. Vinnius. Ad. Inſt. Lib. 3. Tit. 28. 4. 6.

As in payment of a debt, barred by the ſtatute of limitations.

Julianus verum debitorem poſt litem conteſtatam, manente adhuc judicio, negabat ſolventem repetere poſſe: quia nec abſolutus, nec condemnatus repetere poſſet, licet enim abſolutus ſit, natura tamen debitor *permanet*. l. 60. de Cond. Indeb.

Or contracted during his infancy.

Huc item plerique referunt exceptionem Senatus Conſulti Macedoniani; nam et filius familias ſi mutuam pecuniam acceperit, et pater familias perperam ſolverit, non repetit. Vinnius. Quoniam, naturalis obligatio manet, ff. Lib. 14. Tit. 6. de Sct. Maced. l. 9. 10.

It lies for money paid by miſtake.

Quod indebitum per errorem ſolvitur, aut ipſum aut tantumdem repetitur, l. 7. de Cond. Indeb.

Is cui quis per errorem non debitum ſolvit, quaſi ex contractu debere videtur. Inſt. Lib. 3. Tit. 28.

Or

Or upon a consideration which happens to fail.

The whole title in the digest, de *Conditione Causa data, Causa, non secuta*, is an amplified view of this proposition.

Or for money got by imposition, expres or implied, or extortion, or oppression.

Si quis dolo malo aliquem induxerit, aut metu illato coegerit, ut promitteret non possum adduci ut credam, solutum ex his causis retineri posse. Vinnius.

Ex ea stipulatione, quæ per vim extorta esset, si exacta esset pecunia, repetitionem esse constat. ff. Lib. 12. Tit. 5. de Cond. ob Turp. vel Injust. Caus. l. 7.

Or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons, under these circumstances.

Si naturalis obligatio jure civili improbata sit, aut destituta juris civilis auxilio, qualis est mulieris intercedentis. l. 16. § 1. ad Sct. Maced. prodigi promittentes, l. 6. de Verb. Oblig. pupilli sine tutoris contractu, licet hæc admittunt accessiones, ea non attendetur et perinde repetitio datur, ac si quod ex causa solutum est nullo jure debitum esset. Vinnius, 22.

In one word the gist of this action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.

Hoc natura æquum est neminem cum alterius detrimento, fieri locupletiorem. l. 14. de Cond. Indeb.

The damages recovered in the case of *Dutch* v. *Warren*, shew the liberality of this kind of action: for though the defendant received considerably more, yet the difference only was retained against conscience, and therefore the plaintiff ex æquo et bono could recover no more, agreeably to the rule of the Roman law: Quod condictio indebiti non datur ultra quam locupletior est factus qui accepit.

The case of *Smith* v. *Branley*, *Doug.* 696. also affords a very clear instance of a similar parallel:

If

If an act is itſelf immoral, or a violation of the general laws of public policy, there the party paying ſhall not have this action, for where both parties are equally criminal againſt ſuch general laws, potior eſt conditio defendentis.

Ubi dantis et accipientis turpitudo verſatur, non poſſe repeti dicimus: veluti *ſi pecunia detur ut male judicetur*. l. 3. de Cond. ob Turp. vel Injuſt Cauſ.

But there are other laws which are calculated for the protection of the ſubject, againſt oppreſſion, extortion, deceit, &c. If ſuch laws are violated, and the defendant takes advantage of the plaintiff's condition or ſituation, then the plaintiff ſhall recover.

Quotiens autem ſolius accipientis turpitu .. verſatur, Celſus ait repeti poſſe: veluti ſi tibi dedero *ne mihi injuriam facias*. l. 4. ibid.

But it may be ſaid, that however appoſite all the reaſonings deduced from *D'Agueſſeau* and *Vinnius* might be to have ſhewn, *a priori*, what the deciſion ought to have been, whatever influence the diſcuſſion now ſubmitted to the public might have had, if it had been preſented as an argument to the court, the ſubject is now at reſt and concluded by authority, and that any reaſoning of a private individual reſpecting the grounds of that concluſion, muſt be not only unavailing but impertinent.

But however little encouragement the diſcuſſions of a private individual, reſpecting legal ſubjects, have received, or are likely to receive, the reaſons which militate againſt the offering ſuch diſcuſſions to the public, ſeem to be much more numerous on the ſcore of prudence than on the principles of propriety. The law, like every other ſubject, may be regarded as a matter either of practical information, or of ſcientific inquiry; if a doctrine which is merely the ſpeculative opinion of an individual, ſhould be conveyed to the public in ſuch a manner as to be ſuſceptible of producing an erroneous impreſſion, that it was admitted in judicial practice, much inconvenience might ariſe, and much cenſure would be reaſonably incurred. Or if an individual ſhould pronounce a peremptory deciſion, in oppoſition to principles eſtabliſhed by judicial authority, he would be fairly liable to the imputation of preſumption. But in ſuggeſting grounds, and reaſons, in ſupport of a difference of opinion fairly ſtated, every reader is left to the exerciſe of his own judgment, upon the correctneſs of the premiſes and their accordance with the concluſion. To ſupport a general and indiſcriminate objection to this courſe of proceeding, it muſt be aſſumed that the reaſoning which is offered is ſatisfactory and correct; for if either the premiſes are erroneous in themſelves,

ſelves, or inadequate to the concluſion which is deduced from them, an objection ariſes of a very different nature from that of a preſumptuous arraignment of eſtabliſhed authority. Perhaps, in ſome caſes, an examination, of any ſubject may eſcape reprehenſion even whilſt the reſult of it is not aſſented to, as, by exciting an attention to the arguments ſuggeſted, the error of thoſe arguments may be candidly pointed out, and an opportunity may be afforded of giving a correct elucidation of the principles by which they are oppoſed: to promote inquiry is often a matter of not leſs utility, than to bring ſuch inquiry to its proper termination; and if the poſſibility of error was regarded as an invincible objection to the expoſition of what, upon an attentive examination, is conceived to be truth, there would be an impediment to inquiry, which would only prevent the diffuſion of error, at the expence of ſacrificing truth.

If then a fair and liberal inveſtigation may, notwithſtanding the poſſibility or even probability of an error, be attended with advantage, as it excites inquiry, it cannot be reaſonable to object to an inquiry as preſumptuous, when the reſult of it, for anything that the objection neceſſarily ſuppoſes to be contrary, may be judicious and correct, however oppoſite to the concluſions of authority. If the reaſonings of the moſt humble mechanic ſhould, upon examination, be admitted to be accurate, they would not be rejected by the philoſopher, though placed in oppoſition to the opinions of a *Newton*. The oppoſition would be a ſtrong preſumptive evidence of their error, but when that preſumption yielded to the force of ſuperior evidence, no veneration of an illuſtrious name would juſtify rejecting the concluſions eſtabliſhed upon the admitted baſis of reaſon and truth. According to the ſentiment of *Boyle*, while authority is a long bow, the effect of which depends upon the ſtrength of the arm which draws it, reaſon like the croſs-bow, has equal efficacy in the hands of the dwarf, and of the giant.

With reſpect to the effect which prior adjudications ought to be allowed in practice, the beſt ſtandard to appeal to is the rule of public utility, which is the ſource and ought to be the meaſure of aſſent to their authority. If the precedent upon any given ſubject, coincides with what is admitted as the principle, there is no room for diſputation, becauſe the concluſion, to which ever ground it is referred, is manifeſtly the ſame. If the oppoſite analogies, in ſupport of conflicting opinions, are, as it often happens, ſo nearly equal, that the judgment, upon an adequate view of the grounds upon which the deciſion is to be framed, may fairly heſitate between the two, and the deciſion is, in its general conſequences,

a priori, immaterial, the advantage of certainty in adhering to a judicial determination, once pronounced and acted upon, is much too obvious to require proof or illuſtration. Even when the ſubject, upon a retroſpective view, appears to have been ſuch as would not only have admitted of a reaſonable difference of opinion, but have called for a different concluſion upon a full examination of its principles, ſo that what is preſented as authority is admitted to have been founded upon error; it may be frequently beneficial to adhere to ſuch concluſion, and nothing is of more ordinary occurrence: but how far the propriety of ſuch adherence extends, is the main queſtion under conſideration; the propoſition aſſumes the deciſion to be erroneous; the ground of adhering to it is the beneficial conſequence of doing ſo; the queſtion then how far the adherence is proper and requiſite, becomes identified with that of its being beneficial or otherwiſe, conſidered with relation to all its conſequences and effects.

This diſtinction is adverted to by Lord *Mansfield*, in a paſſage in the caſe of *Robinſon* and *Bland*, which I have upon other occaſions appealed to, and which I conſider as marked with peculiar excellence and utility. His obſervation, is, that, "Where an error has been eſtabliſhed and taken root, upon which any rule of property depends, it ought to be adhered to by the judges till the legiſlature think proper to alter it, leſt the new determination ſhould have a retroſpect, and ſhake many queſtions already ſettled: but the reforming erroneous points of practice can have no ſuch bad conſequences, and therefore they may be altered at pleaſure, when found to be abſurd or inconvenient."

May not the latter part of this obſervation, which is in its expreſſions confined to the particular caſe of erroneous practice, with propriety be generalized and applied to every other ſubject which falls within the ſcope of the ſame reaſoning, viz. that to rectify the error will not be attended with any bad conſequences? The abſtract preference of truth is a point which does not require to be eſtabliſhed by argument; the particular conflict is between error ſupported by precedent, and truth in oppoſition to it; and ſurely it appears to be carrying the ſanction to error ſufficiently far, when it is allowed to be co-extenſive with the utility reſulting from it. Perhaps in ſome caſes it may be difficult to fix the criterion to which I am propoſing to refer; and when it becomes doubtful whether the adherence to, or the deviation from, an erroneous authority will, in its general conſequences, be attended with greater benefit and utility, the grand queſtion may ariſe on which ſide the preference ought to be given. I do not conceive that the occaſions for applying the rule which may be adopted,

adopted, in anſwer to that queſtion, would be very numerous; and, without enlarging my obſervation, which probably will be already regarded as too diffuſe, I am willing, for the purpoſe of the diſcuſſion, to admit, that where an erroneous propoſition is eſtabliſhed by authority, and it is doubtful whether the prejudice, from ſubverting the authority, may not exceed the advantage of correcting the error, the precedent ſhould be allowed to have the turn of the ſcale in its favour. But, limiting my admiſſion to the terms in which it is expreſſed, I conceive that the poſſibility or probability, that in ſome caſes, not particularly adverted to or defined, it may be difficult to form an adequate opinion as to the ſuperior advantage of retaining the error or of correcting it, is not, according to any principles of fair reaſoning, to influence the deciſion of other caſes, in which no ſuch circumſtance exiſts, and in which the beneficial conſequences of deciding according to the original reaſon of the ſubject, would confeſſedly preponderate.

And if there are any caſes to which the propriety of a return from precedent to principle moſt diſtinctly and emphatically applies, it is thoſe in which the point in conteſt has reference to the grand and fundamental principles of juſtice and integrity, and which are not included in any eſtabliſhed and connected ſyſtem of poſitive law; in which no extenſive range of property, or order of judicial or commercial proceedings is affected or involved, in which the only miſchievous conſequence of correcting an erroneous precedent will be the ſubjecting to the coſts of an action, a perſon who may have the inclination to acquire to himſelf an adventitious benefit ariſing from the detriment of another, where the one was without merit to entitle him to the advantage, the other without offence to ſubject him to the injury. I here uſe the term *erroneous precedent*, not as aſſuming to decide that the particular precedent under examination is of that quality, but as ſupporting the argument that, if, upon conſideration, it appears to be ſo, there is no predominant reaſon of public utility to militate againſt the correction of it.

It was long a prevailing opinion, (than which certainly none could be more abſurd,) that the act directing ſheriffs to take bail bonds was a private ſtatute, and many caſes proceeded upon that opinion; but the caſe of *Mills* v. *Bond*, 1 *Str.* 399. was decided upon the correct and oppoſite principle. The queſtion afterwards coming before the Court of King's Bench, in *Samuel* v. *Evans*, 2 *T. R.* 569. Mr. Juſtice *Aſhhurſt* ſaid, that "If all the caſes on this ſubject were on one ſide, however apparently contrary to reaſon they might be, the Court would be bound by them; but if there

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are ſeveral caſes which are not reconcileable to reaſon on one ſide, and one ſenſible caſe to the contrary, we ought to decide according to the latter. Now, there can be no doubt on the reaſon of the thing, but that this is a general law; and, the caſe in *Strange* corroborating the opinion that it is ſo, we might determine it to be ſuch, independent of the authority of another act, which unqueſtionably makes it a general law."—I have always regarded this ſentiment as ſtopping ſhort of the true principle, by which the exertion of judicial authority ought to be regulated: and if a court poſſeſſes the authority of correcting an eſtabliſhed doctrine, ſupported by ſeveral caſes which are not reconcileable to reaſon, becauſe there is one ſenſible precedent to the contrary, I cannot ſee any material obſtacle to their ſetting the example of that ſenſible precedent themſelves. The authority of the court is the ſame to-day as yeſterday; in the 44th of *Geo.* 3. as in the 6th of *Geo.* 1.; and it is very difficult to underſtand the logic, by which it would be wrong for a court to correct an erroneous opinion to-day; but if themſelves, or any other court of concurrent authority, had been guilty of that wrong to-day, it would become right to follow the example to-morrow. Would it not place the adminiſtration of juſtice upon a more reſpectable baſis, if it were to be held that reaſon and juſtice ſhould be regarded as its firſt, and precedent as only its ſecondary, principle, than to reverſe the diſpoſition and to ſacrifice the former at the ſhrine of the latter? Admitting moſt willingly the beneficial effects of precedents, in fixing and aſcertaining principles, aſſenting to the impropriety of lightly renewing diſcuſſions upon topics, with reſpect to which reaſon may fairly heſitate in its deciſion and certainty of determination is more beneficial than a particular concluſion on either ſide; objecting to the ſubverſion of confeſſedly erroneous opinions, when they have ſo incorporated themſelves with the juridical ſyſtem, as not to admit of ſeparation without inducing injurious conſequences; the only propoſition which I endeavour to eſtabliſh, or rather to enforce is, that the acknowledged concluſions of reaſon and juſtice ſhall be admitted to prevail over the accidental ſanction of error by precedent, when no important reaſon of public utility requires an oppoſite determination.

I am fully aware that in this, as in other inſtances already adverted to, I may appear to have been unneceſſarily occupied, in ſupporting by a length of argument a ſelf-evident propoſition, which nobody would offer to diſpute. I muſt again advert to my former apology, that the objection, however ſpeculatively true, is often practically falſe; and that the commodious attribute of precedents in ſaving the trouble of an analytical inveſtigation of

principles has given them pre-eminence far beyond any title, to which they can aſpire upon reaſons of general utility.

I may perhaps have alſo incurred the imputation of extending this general diſſertation far beyond the limits which the ſubject that has given riſe to it could have required; without entering into the diſcuſſion of that charge, I am willing to admit, that the diſſertation, although immediately occaſioned by a particular topic, was intended to embrace a general ſubject, a ſubject which I conſider in itſelf as of high importance; the proper ſource of legal argument, the freedom of diſcuſſion allowable to advocates and profeſſional writers, the utility of recurring to the great principles of natural juſtice, and the influence which ought to be allowed to the exiſtence, or to the want of particular precedents with regard to queſtions in their nature referrible to and dependent on thoſe principles. I have alſo deſigned to avail myſelf of the opportunity of defending, with ſome particularity, the courſe of examination which I have adopted in different inquiries already before the public, and in others which a preſent want of encouragement and attention, however mortifying, may perhaps not intimidate me from ſubmitting to their judgment, provided I may indulge the idea, that my endeavours hitherto have not been juſtly marked by a ſentiment of diſapprobation.

Craving indulgence for this egotiſm, I proceed to a ſhort defence of the obſervations firſt alluded to, as included in a former publication, and ſince that period contradicted by judicial authority.

In reſpect to the queſtion, whether money paid merely from a miſtaken idea of legal obligation, unconnected with the exiſtence of any moral duty, is ſubject to repetition, I in the firſt place inſerted the obſervations of *Vinnius* in ſupport of the affirmative propoſition, (which will be ſubjoined in the preſent number,) concluding with the principle deduced from the pureſt ſources of natural juſtice, that *melius eſt favere repetitioni quam adventitio lucro*, and coinciding in their general effect with the argument of *D'Agueſſeau*, of which in the following ſheets I have attempted a tranſlation. Having then mentioned the opinion of *Pothier*, which is expreſſed in very few and general terms to the contrary, and is wholly founded upon the authority of two laws, the effect of which is fully examined by *Vinnius* and *d'Agueſſeau* (*a*): I proceeded to obſerve, that it was ſingular that a queſtion open to ſo much

(*a*) 10 Cod. de Jur. et Fact. Ignor. Cum quis, jus ignorans, indebitam pecuniam ſolverit, ceſſat repetitio; per ignorantiam enim facti tantum, indebiti ſoluti repetitionem competere tibi notum eſt. L. 9. ff. d. t. Ignorantiam facti non juris prodeſſe, nec ſtultis ſolere ſuccurri, ſed erranibus.

diſcuſſion,

diſcuſſion, had paſſed with very little attention in the caſes affected by it in the *Engliſh* courts, that the opinion of *Vinnius*, appeared to be beſt founded, as it aroſe from the application of the rules of natural juſtice, upon which this right of action rather depends, than upon any poſitive rules or artificial reaſoning; to which I added that I conceived (as it may now be thought erroneouſly) that it might be poſitively ſtated, that the opinion was adopted in the *Engliſh* law, and in ſupport of this opinion referred to the caſes of *Ancher* v. *The Bank of England*, *Doug.* 638. *Bize* v. *Dixon*, 1 *T. R.* 285, and to the opinion given by Lord *Kenyon* at *Niſi Prius*, and which has been contradicted in the caſe that has ſince occurred. The two former authorities were not adverted to in the caſe laſt mentioned, and upon a very frequent and (as far as lies in my power) an unprejudiced conſideration of thoſe caſes, it ſtill appears to me impoſſible to reconcile the determinations which they import, and the principle which, though not expreſſed, they neceſſarily involve, with a negative anſwer to the queſtion at preſent under conſideration. In the firſt caſe, the payee of a bill of exchange reſtrained its negotiability by an indorſement, directing the drawees to place it to a particular account. Afterwards it was negotiated with a forged indorſement, of the name of the perſon to whoſe credit it was to be placed, and a third perſon having paid the money for the honour of the payee, to the Bank of *England*, the payee was allowed to recover the amount. As to the obſervations ariſing from that caſe, I think, 1ſt, That it is impoſſible for any diſtinction to be made between a payment by the drawer himſelf, and by another perſon for his honour, and in fact no ſuch diſtinction was taken or adverted to in the caſe. If the drawer was not himſelf liable to the payment of the bill, he was not liable to indemnify any other perſon who, knowing the circumſtances, had paid it on his account; but if he did think proper to adopt the act as his own, he was certainly at liberty ſo to do; but then, if he adopted it at all, he muſt adopt it throughout, and the retroſpective approbation, which is equivalent to an agency, muſt have the ſame effect as a proper agency ariſing from a preceding authority; and, with reſpect to that, it is an undiſputed propoſition that the act of an agent, within the limits of his authority, muſt be in all reſpects conſidered as the act of the principal. 2d, It is impoſſible to ſuppoſe that in this caſe there was any ignorance of fact; the only fact upon which the queſtion of liability depended, was the indorſement actually appearing on the bill: it is not ſtated, nor is it to be ſuppoſed that that indorſement was not read by the perſon who made the payment, and even if it had not, the neglect would have been too groſs to have been the foundation of any right

of action. 3d, No circumstances of fraud, oppression, undue influence, or any other of the grounds upon which the action for money had and received is founded, are alluded to as having existed, or, from the nature of the thing, were likely to have existed, so as to have formed an ingredient in the decision of the case. 4th, There was a difference of opinion in the court as to the effect of the indorsement, it being held by Mr. Justice *Buller*, contrary to the opinion of Lord *Mansfield*, and *Willes*, and *Ashhurst*, J. that it was not restrictive; and upon the legal question, whether it was so or not? the whole discussion turned. After the judges had given their opinions, Lord *Mansfield* said, "The whole turns on the question whether the bill continued negotiable? as the case stands at present let the nonsuit be set aside, and we will consider of it further, and if we alter our opinion we will mention it." The case was not mentioned again, but the cause was tried at the following sittings, when the plaintiff, by Lord *Mansfield*'s directions, obtained a verdict. 5th, In this case then the plaintiff recovered back money which he had paid, not being liable to do so in point of law, there being no ignorance of fact, nor any other cause to induce the right of repetition, beyond the mere decision of his not being under any legal obligation, to make the payment: for, as I have already observed, the act of payment being made by another person for his honour, did not form, and, according to the principles of correct reasoning, could not, as a matter of distinction, form any ingredient in the case. 6th, Then the proposition that a person who has paid a sum of money for which he was not legally obliged, and under circumstances indicating that such payment was made under a mistake of law, is, without any adventitious circumstance, entitled to reclaim it, must be true, or the case must have been improperly decided.

The analysis of the case of *Bize* v. *Dickson*, 1 *T. R.* 285. appears manifestly to lead to the same conclusions. The plaintiff was indebted to the defendants as assignees of a bankrupt in the sum of 1356*l.*; at the same time the bankrupt was indebted in a smaller amount unto divers persons, on whose behalf the plaintiff had effected policies of insurance upon a commission *del credere*; the plaintiff paid to the defendants the amount of the money owing to them, without deducting the money owing from the bankrupt. Several years afterwards it was decided between other parties, that a person in the situation of the plaintiff was entitled to a set-off, and upon that determination being made, the plaintiff brought his action to recover the money before paid, it appearing that the assignees had sufficient money in their hands to refund what had been paid; and the counsel for the defendant declined arguing the case,

caſe, the court being of opinion that it came within the principle of the determination, which eſtabliſhed the right of ſet-off at the time of making the payment, and Lord *Mansfield* ſaid, that the rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conſcience he ought, he cannot recover it in an action for money had and received; ſo when a man has paid a debt which would otherwiſe have been barred by the ſtatute of limitations, or a debt contracted during his infancy, which in juſtice he ought to diſcharge, though the law would not have compelled the payment, yet, the money being paid, it will not oblige the payee to refund it. But where money is paid under a miſtake, which there was no ground to claim in conſcience, the party may recover it in this kind of action.

Here the judgment was profeſſedly and avowedly founded upon the principle of the money having been paid under a miſtake, and it was, in the nature of things, abſolutely impoſſible that it could be referred to any other principle; that there was any miſtake in fact, is not in the ſlighteſt degree hinted at, and any ſuch ſuppoſition would be abſolutely inconſiſtent with the circumſtances of the caſe; the miſtake then was a miſtake of law and nothing more, and although the diſtinction between a miſtake in fact and a miſtake in law was not expreſsly adverted to, either in this caſe or in the preceding, the propoſition that money which has been paid merely under a miſtake in law is ſubject to repetition, is ſo neceſſarily involved in both the determinations, that it is a contradiction in terms to affirm at the ſame time that that propoſition is falſe, and that thoſe determinations can be ſupported.

In the caſe of *Farmer* v. *Arundel*, 2 *Blackſtone's Reports*, 824. to which I ſlightly adverted in the *Eſſay* on the action for money had and received: a certificate of a pauper was given by the overſeers of *Grimly*, to the pariſh of St. *Peter's* in *Worceſter*, or any other pariſh in the ſaid city; the pauper reſiding in St. *Martin's* in *Worceſter*, was removed to *Grimly*, and the defendant, the overſeer of St. *Martin's*, demanded from the plaintiff, the overſeer of *Grimly*, a ſum of money for the maintenance of the pauper, for the laſt four years, which was accordingly paid, and the action was brought to recover it back, on the ground that the defendant, having no right to demand, had no right to retain the money, (the caſe not falling within the ſtatute, which provides the reimburſing the expences of certificate perſons,) and the court held the action not maintainable. Lord Chief Juſtice *De Grey* ſaid, *Where money is paid by one man to another on a miſtake, either of fact* OR OF LAW, *or by deceit, this action will* CERTAINLY *lie*: but the propoſition is not univer-

ſal, that whenever a man pays money which he is not bound to pay, he may by this action recover it. Money due in point of honour, and conſcience, though a man is not compellable to pay it, yet if paid ſhall not be recovered back. Put the *form* of the certificate out of the caſe: it is however evidence at all events, that the pariſh of *Grimly* have ackowledged the pauper to be their pariſhioner, and it is allowed that he has been maintained four years by the pariſh of St. *Martin's*. Admitting therefore, that this money could not have been demanded, (which it is not neceſſary now to decide,) yet I am of opinion that it is an honeſt debt, and that the plaintiff having once paid it, ſhall not by this action, which is conſidered as an equitable action, recover it back again."

It muſt be remembered, that there is no diſpute as to the right of reclaiming money paid under a miſtake of law, not being univerſal and without exception; that it is agreed on all hands that money, which ought in point of honour and honeſty to be paid, cannot be reclaimed; the deciſion in the caſe juſt cited turned wholly upon that excepted principle, but the general propoſition ſtated by the Chief Juſtice, though collateral to the deciſion of the cauſe, is pronounced in terms which indicate a fixed opinion upon the ſubject, and this opinion, however extrajudicial, confirmed and ſupported by two caſes in which a ſimilar opinion, though not expreſſed, was evidently involved, may be thought deſerving of at leaſt as much attention as the caſual expreſſion of Mr. Juſtice *Buller*, in the caſe of *Lowry* and *Bourdieu*, which will be preſently examined.

In the caſe of *Chatfield* and *Paxton*, as ſtated in *Chitty* on *Bills*, 102. the defendants being holders of a bill gave time to the acceptors, and they afterwards became inſolvent, of both which circumſtances the defendants gave the plaintiff notice, and he at their requeſt, in a letter, accepted another bill, which he afterwards paid, and this action was brought to recover the money back. Lord *Kenyon* ſaid, "My opinion is againſt the defendants; it was not only neceſſary that the plaintiff ſhould know all the facts, but he ſhould know the legal conſequence of them; it ſeems to me that the plaintiff did not know the legal conſequence of them, and that he paid this money under an idea that he might be compelled to pay it; when the defendants granted this indulgence, they gave it at their own riſk. Where a man knowing all the facts explicitly, and being under no apprehenſion with regard to any of them, nor of the law acting upon them, chooſes to pay a ſum of money, *volenti non fit injuria*, he ſhall not recover it back again." This caſe afterwards came before the court upon a

motion for a new trial, when the verdict for the plaintiff was confirmed, but the caſe was not at the time reported.

Upon a review of theſe authorities I was induced to form the concluſion, that the opinion, that money paid under a miſtake of law might be reclaimed, was adopted in the *Engliſh* law. But in the caſe of *Bilbie* v. *Lumley*, 2 *Eaſt*, 469. which is the principal cauſe of the preſent diſſertation, the general propoſition being brought before the court, Lord *Ellenborough* aſked the plaintiff's counſel whether he could ſtate any caſe, where, if a party paid money to another voluntarily, with a full knowledge of all the facts of the caſe, he could recover it back again, on account of his ignorance of the law? No anſwer being given, his Lordſhip ſaid, the caſe of *Chatfield* v. *Paxton*, was the only one he ever heard of, where Lord *Kenyon*, at *Niſi Prius*, intimated ſomething of that ſort, but when it was afterwards brought before the court on a motion for a new trial, there was ſome other circumſtance of fact relied on, and it was ſo doubtful at laſt on what preciſe ground the caſe turned, that it was not reported. Every man muſt be taken to be cognizant of the law, otherwiſe there is no ſaying to what extent the excuſe of ignorance might not be carried. It would be urged in almoſt every caſe. In *Lowry* v. *Bourdieu*, money paid under a miſtake of the law was endeavoured to be recovered back, and there *Buller*, J. obſerved that *ignorantia juris non excuſat*.

I have endeavoured, in the preceding obſervations, to examine the effect of an argument founded upon the mere want of precedent, and to ſhew that the propoſition in queſtion was not deſtitute of the ſuccour of precedent, if any ſuch were requiſite; and, whether the argument which I have entered into upon the latter of theſe grounds be correct or otherwiſe, it is always certain that the ſources of it were not adverted to in the caſe of *Bilbie* v. *Lumley*, and that there is nothing in that caſe which contradicts the poſition, that the truth of the before mentioned propoſition is a concluſion neceſſarily connected with the authority of the caſes which have been cited. Mr. *Eaſt* ſubjoins a note to *Bilbie* and *Lumley*, mentioning that the circumſtances of the caſe of *Chatfield* and *Paxton* were ſo ſpecial, and there was ſo much of doubt in it, that it was not thought material to report it, to which he ſubjoins a ſtatement of the caſe, and of the opinions of the judges, from which it appears that the facts were not known at the time of accepting the ſecond bill, though before the payment of it the plaintiff received ſome information of the laches, but not ſuch particular proof as would have enabled him to defend himſelf againſt the demand upon his acceptance in a court; the opinions of

the judges appear to turn principally upon the particular facts. I have a perſonal recollection of the caſe, the diſcuſſion of which turned rather more upon general principles than appears by the report; but I am ready to admit, that it was conducted in a manner very deſultory, and very different from that which might reaſonably be expected in the eſtabliſhment of a legal principle of ſuch extenſive conſequences as that before us. If Lord *Kenyon* had then reſted the caſe upon the propoſition, which he is ſaid to have ſo diſtinctly and explicitly ſtated at the trial, this point would have had all the weight which it could have received from a direct and immediate precedent; as the caſe ſtands, the judgment of the court cannot be fairly adduced as a confirmation, though it is equally certain, that it contains nothing to import a contradiction of the general doctrine ſtated at the trial.

The doctrine that, "Every man muſt be taken to be cognizant of the law, otherwiſe there is no ſaying to what extent the excuſe of ignorance might not be carried, and that it would be urged in almoſt every caſe," is certainly entitled to much attention; but I conceive that the effect of the doctrine is carried ſufficiently far for the purpoſes of public utility, by holding that no man ſhall exempt himſelf from a duty, or ſhelter himſelf from the conſequences of infringing a prohibition impoſed by the law, or acquire an advantage in oppoſition to the legal rights and intereſts of another, by pretending error or ignorance of the law, without its following as a conſequence, that the ignorance of one man under no moral obligation, and intending no gratuitous donation, ſhall be to another a title of adventitious acquiſition. It may be ſtated as a general principle, that money paid without adequate cauſe is ſubject to repetition, and when the only cauſe of payment is a miſtake of law, the adequacy or inadequacy of ſuch cauſe is the important point to which this whole diſcuſſion is to be referred; and if no other cauſe of payment appears, and it is eſtabliſhed that money paid under a miſtake, whether of law or of fact, may (except under ſpecial circumſtances) be reclaimed, and it is doubtful whether ſuch miſtake did or did not exiſt, there can be no injuſtice in adopting the propoſition of *Pothier*, that when it is uncertain whether a man has paid what was not due from him knowingly or erroneouſly, it ought to be preſumed that the payment was made erroneouſly, and that he ſhould be allowed to reclaim it according to the general principle that in *re obſcura melius eſt favere repetitioni, quaſi adventitiâ lucro*, and alſo according to the other general principle already adverted to, as founded upon the principles of natural reaſoning, that *nemo præſumitur donare*.

The caſe of *Lowry* v. *Bourdieu* was minutely obſerved upon, in

in the *Eſſay* on the action for money had and received, it appearing to the writer that the deciſion was correctly right, but that the diſcuſſion of it by the different judges did not entirely proceed upon ſimilar principles. The facts of the caſe are, that the plaintiff made an inſurance upon an *Eaſt India* voyage, not having a direct intereſt in the ſhip, but being a creditor of the captain by bond, and the bond being ſtated as the ſubject of the inſurance. After the voyage had been performed, and all riſque (ſuppoſing the policy valid) was at an end, he brought his action for return of the premium, inſiſting, that as he would not have been entitled to recover in caſe of a loſs, it had been paid without conſideration; and it was held by a majority of the judges, contrary to the opinion of Mr. Juſtice *Willes*, that the action could not be maintained; the poſition which I endeavoured to eſtabliſh was, that where money had been paid upon a void contingent contract, not attended with criminality, and the one party availed himſelf of the illegality of the contract, to avoid the performance of his own part of it, the other was entitled to a return of the money which was paid; and that this caſe did not furniſh any exception to that principle. The more particular examination of that point would be here irrelevant. Upon the queſtion how far the caſe affects the rule now under diſcuſſion? I would in the firſt place examine how far the point involved in the determination, without adverting to any of the obſervations which accompanied it, is or is not applicable. The preſent queſtion is, whether a ſum of money paid merely in conſequence of a miſtaken idea, that it could have been legally exacted, is or is not ſubject to repetition? The queſtion in *Lowry* v. *Bourdieu* related to a ſum of money paid as the conſideration of a proſpective contingent engagement, and reclaimed on account of the inſufficiency of the original engagement, at a time when it was clear that the advantage ſtipulated for could not have been obtained, however legal or obligatory the engagement might have been; the contingency upon which the advantage was to ariſe, having become impoſſible. It is obvious that the two queſtions are perfectly diſtinct, and I conceive it may be juſtly aſſerted that a deciſion againſt the right of repetition in the latter, concludes nothing as to the former. Nothing could be more clear, than that after the riſque had been run, there was no ground for a repetition of the money in point of honour and conſcience, and if not, the principle is admitted on all hands that there could be no ſuch right in point of law. If then the caſe of *Lowry* v. *Bourdieu* concludes nothing upon the ſubject by its mere determination, as the deciſion of law upon the particular facts, it remains to ſee whether the obſervations relied upon in ſupport of it

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can have any greater effect? The opinion of Lord *Mansfield* was, that as the contract was upon a gaming policy, and againſt an act of parliament, the court would not interfere to aſſiſt either party, according to the rule that *in pari delicto potior eſt conditio defendentis.* It is plain that this ground has nothing to do with the payment of money, under the miſtaken idea of a *previous* legal obligation. The opinion of Mr. Juſtice *Willes* was, that the plaintiff ſhould recover, for that it would be very hard that a party ſhould loſe, when he had paid under a mere miſtake.—I conceive that this opinion, as applied to the particular caſe, and inaſmuch as it did not embrace the conſideration of the point how far the plaintiff in honour and juſtice was entitled to a return, did not fully meet the caſe, but it certainly contains nothing to militate againſt a general right of repetition. Mr. Juſtice *Aſhhurſt* was againſt the right of return, but his only obſervation was, that the contract was a gaming policy, not adverting to the fact, that that very circumſtance was the whole foundation of the plaintiff's claim. The opinion of Mr. Juſtice *Buller*, which muſt be ſtated at length, is as follows: "It is very clear to me that the plaintiff ought not to recover. There was no fraud on the part of the underwriters, nor any miſtake in matter of fact. If the law was miſtaken, the rule applies, that *ignorantia juris non excuſat.* This was a mere gaming policy without intereſt. There is a found diſtinction between contracts executed and executory; and if an action be brought with a view to reſcind a contract, you muſt do it while the contract continues executory, and then it can only be done on the terms of reſtoring the other party to his original ſituation. There was a caſe of *Walker* v. *Chapman*, ſome years ago in this court, where a ſum of money had been paid, in order to procure a place in the cuſtoms; the place had not been procured, and the party who had paid the money having brought his action to recover it back, it was held, that he ſhould recover, becauſe the contract remained executory; ſo if the plaintiffs in the preſent caſe had brought their action before the riſk was over, and the voyage finiſhed, they might have had a ground for their demand; but they waited till the riſk (ſuch as it was, not indeed founded in law, but reſting on the honour of the defendant) had been completely run. It makes no difference whether the premium was paid before the voyage or after it." The queſtion is, Whether the obſervation, "that if the law was miſtaken, the rule applies, that *ignorantia juris non excuſat*," thus caſually and incidentally applied, is to decide the important and extenſive point at preſent under conſideration? The rule in its terms is ſufficiently ſatisfied, by holding that no man ſhall, under the pretence of an ignorance of the law, excuſe himſelf from the

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performance of his own obligations, or acquire an advantage, or avoid a detriment, when he has omitted uſing the means ordained by law for thoſe purpoſes. Applied to the immediate ſubject matter, it has no reference to the point, of money paid under a miſtaken idea of a preceding obligation. Applied generally and indiſcriminately, it is inconſiſtent with the idea expreſſed in very unequivocal terms in the ſame opinion, that the money can be recovered back whilſt the contract remains executory and contingent; for even in that caſe, the claim can only be money paid on a conſideration, which could not have any legal effect; the opinion which admits the party to reclaim the money, whilſt by the terms of the contract he may have a chance of benefit, but not afterwards, is totally oppoſite to the general ground, that he cannot in any caſe reclaim money paid under a miſtake of law, and the ſeveral inſtances in which it has been held that money paid upon ſuch conſiderations may be reclaimed, whilſt the event is contingent, or when the event has been unfavourable to the receiver, and he has taken advantage of the invalidity of his promiſe, are inconſiſtent with the poſition ſuppoſed to be involved in the caſe of *Lowry* v. *Bourdieu*, that money paid under a miſtake of law can in no caſe be reclaimed. If then the propoſition is not univerſally true, I conceive it may be fairly argued that there is nothing in the caſe adverted to ſufficient to counterbalance what may appear, upon due conſideration, to be the true concluſion with reſpect to the ſubject of the preſent inquiry; and if the queſtion previous to the laſt deciſion was open to argument, it will remain to conſider how far, ſince that deciſion, the diſcuſſion of it is precluded by abſolute authority.

Upon this ſubject I ſhall not add any further obſervations of my own. It will be recollected that the argument only refers to the general propoſition, and not to its application, or to the exceptions which may be admitted in particular caſes. Unleſs the ſubject is ſo concluded by authority as to be no longer open to argument, I conceive that no ſtronger argument can be neceſſary in indicating the true concluſion, than the opinion of *D'Agueſſeau*, that one man cannot profit by the error of another, whether of law or fact, without abſolutely contradicting a ſeries of propoſitions, every one of which is a firſt principle of natural juſtice.

If, upon the reſult of a fair inquiry, it ſhould appear that money paid under a mere miſtaken idea of legal obligation, without any purpoſe

purpoſe of gratuitous donation or liberality, and for the payment of which there was no moral duty, is ſubject to repetition, it ſeems to follow, as a neceſſary conſequence, that a promiſe of payment founded merely upon ſuch miſtake cannot be obligatory: for there certainly are many caſes in which an act, voluntarily done, will continue valid, notwithſtanding a naked promiſe to do ſuch act could not have been enforced, as is the caſe with regard to all acts of mere liberality; but it would be abſolutely contradictory, that a promiſe to do an act ſhould be legally enforced, while the act itſelf, if done without ſuch promiſe, would be liable to be reſcinded. But admitting it to be eſtabliſhed, that the act, if done, muſt be ſuffered to remain; admitting that a man who has contrived to get a caſual advantage by the loſs and ruin of another, is not to be diſturbed in the enjoyment of it, it does not follow as a conſequence that a promiſe to confer ſuch advantage without any adequate cauſe can be enforced conſiſtently with the correct principles of legal reaſoning; the particular queſtion, whether an indorſer of a bill of exchange, making a promiſe to pay with a knowledge of circumſtances by which he is legally diſcharged, but without knowing the legal conſequences, is bound by ſuch promiſe, is an inſtance of this deſcription; and the true deciſion of the particular queſtion, depends upon the true expoſition of the general principle. I ſhall not here enter into diſcuſſion, how this ignorance of the legal conſequences is to be proved; but will take it as an aſcertained fact, obſerving by the way, that if the evidence upon that ſubject is indifferent, it is rather to be preſumed that a man did not without any motive intend to renew an obligation, from which he was legally diſcharged, than that he did; and that even ſuppoſing his knowledge of the law to be admitted, and ſuppoſing that he intended to enter into a new obligation, (the caſe being unaccompanied by any circumſtances amounting to a new conſideration,) it would be very difficult to reconcile a liability founded on ſuch a promiſe, with the ordinary principles of the law, upon the topics to which I ſhall advert in the diſcuſſion of the queſtion to which I confine myſelf, and which aſſumes the ignorance of the law to be an undiſputed fact, and the ſuppoſition of an exiſting legal obligation to be the only cauſe and foundation of the promiſe.

I will alſo remove out of the diſcuſſion all conſiderations, founded upon the mode or circumſtances of the promiſe. I will not rely upon the kind of evidence by which acknowledgments or promiſes are frequently obtained or proved, by the tricks of an artful perſon knowing the defect intended to be remedied, and contriving

contriving to ſurprize from the ignorance of another a correction of it, by taking advantage of indefinite expreſſions extorted by terror or ſurprize, or not unfrequently fabricated by perjury. All theſe are accidental circumſtances, but circumſtances of very frequent occurrence, againſt which the legiſlature has in particular inſtances placed a guard by the ſtatute of frauds; they are circumſtances to which the ſubject is peculiarly liable from its very nature, but they may be all corrected by a ſimilar legiſlative proviſion; and the general queſtion would in its eſſential quality remain unaffected.

I ſhall juſt advert to the ſtreſs which is ſometimes placed upon the acknowledgment of a ſuppoſed exiſting obligation. Such acknowledgment, according to the principles of accurate reaſoning, cannot be regarded as any thing more than evidence of actual exiſting facts, by which the obligation referred to is ſupported; and conſidering it merely as a medium of evidence, it is, like every other evidence, ſubject to be contradicted and explained. I am not ſpeaking of any fraudulent acknowledgment of non-exiſting facts, by which a perſon to whom it is made may be wilfully miſled, or even of an innocent miſrepreſentation of facts operating to the prejudice of another, and for the conſequences of which the perſon making it may be anſwerable; theſe are collateral and particular caſes, depending upon particular reaſoning, unconnected with the general ſubject. I ſuppoſe a man innocently to acknowledge a fact by which he is chargeable as true, but which appears eventually to be falſe: I ſuppoſe him to acknowledge that he owes 100*l.* to *A. B.* for the price of a horſe; and it appears that the horſe was ſold by *C. D.*, or that the money has been paid, every body will admit that ſuch acknowledgment is merely nugatory. I alſo ſuppoſe a man to ſtate a given ſeries of facts, upon which, in point of law, no obligation ariſes; and at the foot of that ſtatement to ſubjoin, "I admit that in conſequence of theſe facts, I am under ſuch an obligation in point of law." I believe it will not be argued that his ſubjoining this erroneous legal opinion, will induce an obligation, which the facts are incompetent to ſupport. Theſe are extreme caſes, but they are caſes which exhibit the naked principle, diveſted of all adventitious colouring, which can only be calculated to miſlead, and whatever is the true concluſion as to caſes thus nakedly ſtated, muſt be equally true as to the other caſes reducible to ſame principles, and unſupported by peculiar circumſtances containing in themſelves a ſubſtantive and efficient cauſe of obligation, and which cannot be drawn into conſequence, where the ſame cauſe of obligation does not exiſt; in fine, an acknowledgment,

for the exiſtence of the fact acknowledged is conſiſtent with the admitted ground of defence.

But it has been held that the exiſtence of a previous moral obligation is ſufficient to maintain an actual promiſe. The caſes in which this has been decided, ſeem, as far as I am aware of them, almoſt wholly referrible to the principle of a ſubſequent aſſent, being equivalent, under theſe circumſtances, to a previous requeſt, and operating retroſpectively and with ſome degree of fiction, as amounting to ſuch requeſt. I am not acquainted with any caſe which has been under the cognizance of judicial authority, where the mere diſcharge of a moral obligation was ſtated, upon the declaration, as the conſideration of the promiſe.

The term *moral obligation* is very difficult to be defined for the purpoſe of legal reaſoning, although it may perhaps be ſufficiently definite for the purpoſes of the ſcience to which it belongs, wherein the ſource of obligation, and ſanction for its performance, are referred wholly to the internal ſenſe of rectitude in the perſon ſuppoſed to be affected by it. A term ſo familiar in its application, does not at firſt view appear to preſent any peculiar difficulty, but when examined with a view to legal preciſion the apparent facility ceaſes; and whilſt certain attributes are applied to the indefinite term, the criterion, by which the propriety of the term, and the extent of the conſequences applied to it, are to be determined in particular inſtances, is itſelf by no means clearly ſettled. It will hardly be contended that every duty of imperfect obligation, the exiſtence of which can be demonſtrated by the ſcience of ethics, can be the conſideration of a valid promiſe to be enforced by the coercion of the law; the duties of gratitude and beneficence are allowed to be real and very extenſive ſources of moral obligation, but are never held an adequate foundation for legal reſponſibility. A declaration, that in conſideration that *John* had formerly lent a ſum of money to *Richard*, which had been attended with very beneficial conſequences, and that *John* was now in indigent circumſtances; *Richard* promiſed to pay him 100*l.* a-year, would ſcarcely be expected to ſtand the teſt of a demurrer; but the morality of the obligation would be ſupported by every principle of ethical reaſoning. But though I advert to the difficulty of fixing the ſtandard of that moral obligation, which ſhall be ſufficiently particular and diſtinct, to be legally recognized, as the foundation of a valid promiſe, I do not feel myſelf engaged to attempt a ſolution of it; for taking the term in its moſt vague and indefinite character, and allowing it in that character every thing that can be claimed for it, I conſider it as inapplicable to the

point under conſideration; and, to be more preciſe, I conſider that the mere miſtaken opinion of legal reſponſibility, whether generally or in the particular caſe which has occaſioned theſe obſervations, is not to be regarded as a moral obligation, according to the moſt extenſive ſenſe, in which that term can with reference to the preſent purpoſe be applied.

When the effect of the ſuppoſed obligation is all gain on the one ſide, and all loſs on the other, it is obvious that there is no morality to appeal to in ſupport of it, and that the concluſions of morality are wholly on the oppoſite ſide, for there cannot be much difference amongſt caſuiſts upon the queſtion, Whether a man ought to take advantage of an engagement in his own favour, which has no other foundation than the ignorance of another, who ſuppoſed himſelf to be merely ſatisfying a legal claim? But in moſt diſputed caſes, there is an actual loſs, and the queſtion is on whom the conſequences of it are to fall; where both are equally free from all imputation of impropriety or neglect, to uſe the language of the law, where both are equally innocent, there is no principle of moral duty to vary the deciſion of the law. The poſitive rule, that where equity is equal, the law is to prevail, is founded upon principles not only of that equity, which is a particular ſyſtem of eſtabliſhed juriſprudence, but alſo of the more extended equity, which conſiſts in moral obligation. In ſhort there is no equity, no moral obligation, the preſſure of the accident is to be directed by other conſiderations, and equity and morality are wholly unoperative, and whatever may be affirmed upon that ſubject, when no culpability is imputable to either, is to be applied, if poſſible, with greater force in favour of the one ſide, when any neglect is imputable to the other. If then the law decides that the loſs ſhall fall upon the one, and there is no reaſon of moral equity to throw it upon the other, and, *a fortiori*, if the deciſion of the law is accompanied by any negligence in the party, what foundation can there be for aſſerting that the ignorance and inadvertence of the party who is exempt from the loſs, can be the ſource of moral obligation in favour of him who is ſubject to it? Or if there is no ſuch obligation previous to the making of the promiſe, is the act of promiſing ſo occaſioned, both cauſe and effect? And does it render thoſe circumſtances morally obligatory which previouſly were not ſo? And if not, what is the moral obligation which amounts to a valid conſideration for the promiſe? When the law has ſettled the loſs between the two, to the one party it is as much his own, to the other it is as much extrinſic as between two ſtrangers abſolutely unconnected. Whatever throws the burthen from the one who is to bear it, and caſts it upon the

other who is not, becomes to all intents and purpoſes an adventitious gain to the firſt, ariſing from the detriment of the laſt. Can the one conſiſtently with moral ſentiments found his title to ſuch gain merely upon the advantage which is taken by the ignorance of the other? Is the other, merely in conſequence of his ignorance, ſo far committed in point of moral duty to undertake an adventitious loſs, as to render it meet that the authority of juſtice ſhould interpoſe to compel the execution of his engagement?

To be more particular: A perſon engages to do a given act upon a certain condition, the condition is not performed, the obligation then is (collateral circumſtances out of the caſe) at an end; and it cannot be imputed to him as a violation of good faith, that he does not perform the act intended, he is under no moral obligation to do it; and if he promiſes to do it, there is no conſideration upon which the promiſe is to be maintained. If he makes the promiſe under no miſapprehenſion, he is ſubject to the imputation which belongs to every man who violates a promiſe of mere liberality, and to nothing more. If he makes it under the miſapprehenſion of a legal duty, he is not even ſubject to that; if the error is in the fact, every one is agreed both as to the morality and the law; if it is in the law, it is for thoſe who contend for a different concluſion, to ſhew the ground and reaſon of the difference.

But the condition attached to a promiſe may be either expreſſed, or it may be included in the very nature of the promiſe itſelf; and the intention may be general to enter into the engagement, ſubject to the legal conſequences of it, without an accurate information of what thoſe conſequences may be. From the failure of the condition the obligation is at an end, as if it never had exiſted, no blame can be aſſigned to the refuſal of doing the act that was promiſed: for, under the exiſting circumſtances no ſuch promiſe was made; previous to an actual promiſe there is no duty whatever; the promiſe ſuppoſes a duty, and does not create one, the ſuppoſition is deſtroyed, and the promiſe is at an end.

And from particular to paſs to technical reaſoning; in caſe a declaration ſhould allege the indorſement of a bill, and thoſe circumſtances by which the indorſee was legally diſcharged, but that the indorſer believed and imagined himſelf to be liable in point of law to the payment of it, and in conſideration of ſuch belief and imagination promiſed to do ſo. Or if it was declared, that the defendant ſubſcribed a policy on a ſhip, which was loſt by the careleſſneſs and neglect of the maſter without any fraud, but that the defendant believing the ſame to be barratry, promiſed to pay his ſubſcription; it would not be difficult in either of theſe caſes

to

to anticipate the reſult. But if the full allegation of the facts, upon which the obligation is ſuppoſed to ariſe, ſhould evince that no ſuch obligation exiſted, can the proof of the ſame facts upon a different allegation have a greater effect? and if the facts above ſtated, inſtead of being ſtated in the declaration, appeared in a ſpecial verdict given upon a declaration in the accuſtomed form, it would be very difficult to find a reaſon for a more favourable deciſion, the conſideration, which in the one caſe would be held inſufficient, would vary from the allegation in the other. In an action on the inſurance, a letter is produced; ſtating, I underſtand the veſſel was loſt not by fraud but by other accident, which, though not fraudulent, was highly improper, but as that has lately been decided to be barratry, I will pay it in due courſe. A new deciſion ſhews that that was a miſtake; the queſtion is, if a letter ſo framed is concluſive, and if not, why ſhould a letter from an indorſee ſtating—the bill was not preſented in time, but as I find the drawer had no effects in the hands of the drawee, and my attorney's clerk tells me I am anſwerable—I will therefore pay it in a month? And if ſuch a letter would be *felo de ſe*, is there any ſubſtantial reaſon for giving a higher effect to a mere general promiſe, the cauſe of which, from the nature of the tranſaction, appears to be no more than a ſimilar piece of ignorance?—And again.—The declaration ſtates that the defendant indorſed, and was thereby liable, and being ſo liable in conſideration, therefore promiſed to pay. If he is chargeable under this obligation, it is either by reaſon of his original liability or of his promiſe, but the former is negatived by the ſuppoſition; the latter is not true, for the conſideration was not that he was liable, but that he thought himſelf liable, which is a variance. And let not this reaſoning be objected to as founded upon cavil. The courſe of ſpecial pleading, and the neceſſary conformity between the pleadings and the proofs are, after making due allowances for acknowledged legal fictions, among the ſureſt touchſtones of legal reſponſibility. In the action of *indebitatus aſſumpſit*, the conſideration is uſually every thing, and the actual promiſe nothing. In the caſe of bills and notes, the promiſe is only inſerted in the declaration, for the convenience of adding the ordinary money counts; the baſis of the action is the liability upon the original contract; but here the hypotheſis ſuppoſes that liability not to exiſt; and it is impoſſible to deny that an apprehenſion of liability, and an actual liability are perfectly diſtinct not only in form but in principle; if then the promiſe and not the liability is the ground of action, it muſt either be admitted that the conſideration ſtated of an actual liability is falſe, and that the ground is therefore inſufficient, or,

2dly, the propoſition above aſſumed as true, and which it will be difficult to conteſt, viz. that no action can be maintained on a promiſe, unleſs it is founded on an adequate conſideration, nor unleſs ſuch conſideration is alleged, and the allegation ſupported by proof, muſt be rejected as falſe; or elſe 3dly, a ſimilar falſehood muſt be imputed to the propoſition laſt mentioned, viz. that an apprehenſion of liability, and an actual liability are perfectly diſtinct. And if this part of the argument is objected to, as founded upon reaſoning which is technical and artificial, let it be remembered, that I do not reſt the opinion which I am endeavouring to ſupport merely upon that mode of reaſoning, but that I have previouſly deduced my obſervations from ſources of a different nature; that my preſent object is to manifeſt the ſame concluſion, as equally reſulting from the moſt extenſive principles of general juſtice, and from the ſtricteſt rules of technical practice.

To the preceding arguments, I would add a ſhort reference to ſome caſes in which the invalidity of a promiſe has been judicially held, to reſult from the inadequacy of the conſideration. In *Rann* v. *Hughes*, before the Houſe of Lords, cited 7 *T. R.* 350., the ſubſtance of the declaration was, that the plaintiff being indebted as adminiſtrator promiſed to pay perſonally, and it was holden that there was no ſufficient conſideration to ſupport this demand, againſt the adminiſtrator in his perſonal capacity, for he derived no advantage or convenience from the promiſe. In the caſe of *Mitchiſon* v. *Hawſon*, (to which the preceding is a note,) it was ſtated that the huſband was indebted for work done for his wife before her marriage, and in conſideration thereof, promiſed to pay. The huſband was only liable jointly with his wife; and by her death would be diſcharged; and ſuch joint liability was held no conſideration for his ſeparate promiſe. In *Pearſon* v. *Henry*, 5 *T. R.* 6. an adminiſtrator ſubmitted to arbitration; the arbitrators found a ſum due from the inteſtate's eſtate, but did not award payment; the plaintiff offered to prove, that when the defendant entered into the arbitration bond, he had expreſsly undertaken to pay what might be found due; the evidence was rejected; and when the caſe was brought before the court, Mr. J. *Buller* ſaid, that ſuch evidence would not avail the plaintiff in that action, for the action was brought againſt the defendant as adminiſtrator; and if there were no aſſets, the perſonal promiſe of the adminiſtrator would be *nudum pactum*. Now in the two former of theſe caſes, there was an actual though ſpecial liability to do the act promiſed; but ſuch ſpecial liability was not held to be any conſideration for a general promiſe; the laſt one is only mentioned as confirmatory of the ſame doctrine; but if a ſpecial ſubſiſting

ſiſting liability is no conſideration for a general promiſe, much leſs ſhould a mere ſuppoſed liability, when all actual liability had ceaſed, be allowed to have a more extenſive operation. A valid conſideration muſt in general conſiſt in ſome thing which is to the advantage to the defendant, or detriment of the plaintiff, but the defendant has no advantage of induce him to undertake the payment of a debt, from which he is legally diſcharged, the detriment to the plaintiff which is requiſite to form a valid conſideration, is a detriment which he is induced by the promiſe to undertake, and not one to which he himſelf is already ſubject, and which he has no legal right to ſhift upon another. And with reſpect to the queſtion of moral obligation, I have already propoſed the conſideration of the queſtion, how far, when the law pronounces upon which of two innocent parties a loſs is to fall, and there is no ſpecial reaſon to throw it on the other, and a promiſe is made merely under a miſtaken idea of legal obligation, any principle of moral duty preceded, accompanied or reſulted from ſuch promiſe, ſo as to give it a legal validity and effect, I have already diſclaimed, relying upon the argument deduced from the beggarly evidence by which theſe promiſes are ſupported, and the artful contrivances by which they are obtained by cunning from ignorance; I have argued the caſe as free from theſe objections; but the tendency of a different concluſion on the legal queſtion to produce ſuch evidence, and ſuggeſt ſuch contrivances, may, in cloſing this part of the ſubject, be referred to as an additional reaſon, for ſupporting what I have endeavoured to eſtabliſh as the general principle, and for evincing its juſtice and propriety. It may be ſaid that *vigilantibus non dormientibus jura ſubveniunt*; but this rule rather operates to evince the propriety of deciding where the loſs ſhall originally fall, than to encourage the experiments of art upon ignorance, in transferring it from one perſon to another, and, however rightly the law may encourage vigilance, the general rules of juſtice muſt be ever at variance, with the ſeizing at adventitious advantages by one man, in oppoſition to the legal right of another, with the triumph of artifice and cunning over ignorance and weakneſs.

I have thus far endeavoured to forget, that any foreign ſyſtem of juriſprudence may, with reſpect to the queſtion in diſcuſſion, have a tendency to aſſiſt in the illuſtration of our own, but there appears to me to be ſuch an analogy between the action of *indebitatus aſſumpſit*, and the *pactum pecuniæ conſtitutæ* of the *Roman* law, that I think there would be more affectation in omitting to notice the accordance which occurs to the mind, than there can be of real pedantry in the introduction of it. It muſt be recollected,

that the very term *nudum pactum*, as importing a promiſe invalid for want of conſideration, is borrowed from the *Roman* law; and a very ſlight acquaintance with the two ſyſtems upon the ſubject, muſt be ſufficient to evince their general conformity. By the *Roman* law a *pactum conſtitutæ pecuniæ* was a promiſe to pay a ſubſiſting debt, whether natural or civil, made in ſuch a manner as not to extinguiſh the preceding debt, and introduced by the *Prætor* to obviate ſome formal difficulties. I do not know that any more correct idea can be given of the origin and nature of the action of an *indebitatus aſſumpſit* (a): it was an action that might be brought upon the promiſe for the payment of a debt, it was not ſubject to the wager of law, and other technical difficulties of the regular action of debt, but by ſuch promiſe the right to the action of debt was not extinguiſhed or varied. In *Slade*'s caſe, 4 *Rep.* 4. the declaration ſtated, that in conſideration that the plaintiff ſold the defendant certain corn, the defendant promiſed to pay. The jury, by a ſpecial verdict, found that there was no other promiſe except the bargain for the ſale. From the diſcuſſion which the caſe received, it is evident that it could not have been before that time uſual to proceed in aſſumpſit without a diſtinct expreſs promiſe, but the ſufficiency of the declaration was eſtabliſhed, and the caſe is in a great degree the foundation of the moſt ordinary action in modern practice. It will be recollected, that notwithſtanding the jealouſy which, on account of one arbitrary principle, was heretofore entertained of the civil law, did not extend to the Chancellors by whom the writs were framed, and the conformity in this caſe between the two remedies, and the entire ſyſtem, ſeems to be too great to be merely accidental; and it was a firſt principle of the obligation of the *pactum pecuniæ conſtitutæ*, that it could not ſubſiſt unleſs there was actually a pre-exiſting debt.

Heneccius ad Pand de jur. et fact. ign. has the oppoſite opinion to that of *D'Agueſſeau* and *Vinnius*, with reſpect to the right of repetition, but with reſpect to an engagement entered into under a miſtake of law, he holds, that no obligation is contracted. His expreſſion is as follows; *Diſtinguendum, utrum ex ignorantia juris rem tradiderim eamque velim actione repetere: an eam promiſſam ex hujus modo ignorantia adhuc poſſideam, et de ea retinenda ſim ſollicitus. Priori caſu, inquiunt leges, ignorantia nocet, L.* 10. *c. h. t, poſteriore non nocet, ſed promittens exceptione tutus, L.* 7. 8. *D. h. t.*

I have carried this preliminary diſſertation much beyond the limits which I originally expected, but I truſt that the topics which I have introduced will not be found wholly unintereſting,

(a) See Treatiſe on Obligations, P. 2. c. 6. ſ. 2.

to

to thoſe who are diſpoſed to attend to the inveſtigation of legal principles. I am aware that ſuch diſcuſſions are by no means a favourite branch of ſtudy, and I do not indulge the idea that the preſent attempt will be admitted as an exception. To the charge of preſumption in queſtioning the concluſions of judicial authority, may be added that of aſcribing a diſproportionate importance to the queſtions examined. I certainly feel a different impreſſion upon that ſubject, and hope that the importance of the queſtions themſelves, conſidered with relation to their conſequences and effects, has at leaſt had ſome co-operation with the wiſh to ſupport former opinions, not hazarded upon the impreſſion of the moment, but founded upon deliberate though perhaps erroneous conſideration. In thus endeavouring to promote a familiarity with other laws, I am ſure that I ſhall not, deſervedly at leaſt, incur the imputation of indifference to our own, but in this diſcuſſion as in all others, I am deſirous of witneſſing ſuch a uniformity between different ſyſtems of juriſprudence, as reſults from correct and proper application of the general principles of natural reaſon, and univerſal juſtice.

DISSERTATION

ON

MISTAKES OF LAW.

By M. D'AGUESSEAU.

I. EVERY man may be contemplated with relation either to the public order of ſociety, or to the particular engagements which he contracts with other men; from this twofold idea, reſults the diſtinction which the *Roman* juriſts ſeem to have eſtabliſhed between the public ſtate and the private.

II. In the firſt of theſe aſpects, a man is committed with the law itſelf; it is with the law alone that he contracts, that he engages, that he binds himſelf, with reſpect to every thing which regards the general police, and the exterior order of ſociety; it is to the law alone that he is accountable for his infractions of it.

III. In the ſecond aſpect, on the contrary, a man has only to regard the perſon with whom he contracts; the law does not puniſh an ignorance which relates only to a matter of private right; although it eſtabliſhes this right in the ſame manner as the public law; it only regulates it with reference to the intereſt of individuals, and the loſs of the rights which might have belonged to them is the only penalty which the law attaches to thoſe who, by their imprudence, have merely infringed (*bleſſé*) the maxims of private order.

IV. As the public order regards the public utility directly, while the order of private right only regards it indirectly, the firſt ought always to be conſidered as more important and inviolable than the laſt.

V. As public law only regulates the moſt exterior actions of men, it is more eaſily to be conceived and obſerved than private.

Of

Of the fifty books of which the digeſt is compoſed, there are more than forty entirely devoted to the explication of the rules of private right; and there is almoſt the ſame proportion in the code of *Juſtinian*.

VI. From all theſe differences we may deduce this general conſequence, that although ignorance of legal obligation is always reprehenſible, it is however much more criminal, when it violates the maxims of public order, than when it merely affects ſome rule of private right.

1ſt, Becauſe the law is always in the right, and as in matters of public order, a man only treats with the law, there can never be that compenſation of mutual faults, which often ſerves as an excuſe to thoſe who treat with other men upon any thing which relates to private order (*a*).

2d, Becauſe the perſon who by miſtake contravenes a private law, does no injury to any one but himſelf; while he who through ignorance violates a public law, or rather a law of public order, attacks as much as in him lies the whole ſtate of civil ſociety, and directly offends againſt the general utility of the community.

3d, Becauſe the public law (by which I mean that which ought to be practiſed by all the citizens) being much more ſimple, the perſon who is ignorant of it is much more inexcuſable.

VII. Then by a neceſſary conſequence of this principle, ignorance of public order ought always to be puniſhed, although the quality of the perſons, the nature of the laws, and the variety of circumſtances may very much increaſe, or diminiſh the degree of puniſhment.

VIII. Then, that which is loſt by an ignorance of the public law, is loſt without reſource, ſince this ignorance, ſo far from ſerving as an excuſe, ſtands in need of one itſelf.

IX. Much leſs then can an ignorance of public order be a ſufficient reaſon for recovering an advantage, which a party has failed to acquire; for how can that ever be the object of recompence which may be deemed fortunate in eſcaping puniſhment?

But as theſe rigid maxims cannot always be obſerved with regard to private right, it is neceſſary to premiſe ſome general notions, which may ſerve to diſcover the real principles that are applicable to this ſubject.

(*a*) This reaſon muſt be acknowledged to be rather fanciful than ſolid.

I. It

I. It is naturally juſt that one man ſhall not be enriched by the detriment and injury of another (*a*).

II. That which is ours cannot, without our own act, be transferred to another (*b*).

But conſent or even neglect is here underſtood by the name of an act. *Vi. Jac. Gothof. ad hancce regulam.*

III. There is no obligation without a cauſe;—a conſequence of the preceding principle.

The principles of equity and juſtice give a right to reclaim what belong to one perſon and is without any cauſe, in the poſſeſſion of another (*c*).

IV. That which is null in itſelf produces no effect; then, if there is no obligation in the beginning, becauſe the promiſe is made without a cauſe, the obligation before payment may be reſcinded, after payment the thing paid may be reclaimed (*d*).

Hence ariſe the actions *condictio indebiti, condictio ſine cauſa, condictio cauſa data, cauſa non ſecuta*—and *condictio ob turpem vel injuſtam cauſam. Tot. Tit. ff. & Cod.*

V. It is the ſame whether there is no cauſe, or an unjuſt cauſe (*e*) at firſt, or whether the cauſe for which the obligation was contracted has failed.

Whether the promiſe was from the beginning without any cauſe; or whether there was a cauſe which ceaſed, or failed, there is a right of repetition. (*f*) *L.* 1. § 2. *ff. de Cond. ſine Cauſa.*

It it evident that whatever has been received by any perſon without a juſt cauſe, or for a cauſe which is no longer juſt (*g*), may be reclaimed.

If a payment be made by error on account of any of thoſe

(*a*) Jure naturæ æquum eſt, neminem cum alterius detrimento et injuria fieri locupletiorem. L. 206. ff. de R. J. L. 14. ff. de Cond. Indeb.

(*b*) Id quod noſtrum eſt, ſine noſtro facto ad alterum transferri non poteſt. L. 11. ff. de R. J.

(*c*) Hæc condictio ex bono et æquo introducta, quod alterius apud alterum ſine cauſâ deprehenditur, revocare conſuevit. L. 66. ff. de Cond. Indeb.

(*d*) Si ab initio non conſtitit obligatio quia ſine cauſâ promiſſum eſt, ante ſolutionem ipſa obligatio, poſt ſolutionem quantitas ſoluta condicetur. L. 1. ff. de Condic. ſine cauſâ.

(*e*) This does not mean an illegal contract, for in reſpect to that it is an eſtabliſhed principle that both parties being in equal turpitude there is no repetition.

(*f*) Sive ab initio ſine cauſâ promiſſum eſt, ſive fuit cauſa promittendi, quæ finita eſt, vel ſecuta non eſt, dicendum eſt condictioni locum eſſe.

(*g*) Conſtat id demum condici poſſe alicui, quod vel non ex juſtâ cauſâ ad eum pervenit, vel redit ad non juſtam cauſam. Dict. Leg. § 3. ibid.

cauſes,

cauſes, which are of no avail or effect in law, there is a right of repetition (*a*).

VI. It is of little importance whether the obligation be entirely without any cauſe at all, or whether there be only a cauſe as to part: what is uſeful is not vitiated by what is uſeleſs, neither can what is uſeleſs be confirmed by what is uſeful; but the obligation is deſtroyed (*b*). Such are the very words of *Julian*, in *L.* 3. *ff. de Cond. ſine Cauſa.*

Neither does it ſignify, whether a perſon undertakes an obligation entirely without cauſe, or whether he undertakes a greater obligation than he ſhould have done, except that he muſt proceed in a different manner, to be liberated from the whole or from the exceſs.

VII. The ſame obligation may ariſe from ſeveral cauſes, one of which may fail while the others remain, but as long as any one cauſe remains the obligation is ſuſtained; for ſuch an interpretation ought always to be made, that the act may rather ſtand than fall.

VIII. A thing may be ſaid to be not due, in ſeveral different ways.

1. If it is not due by any law, that is, neither by the law of nature, nor by the civil law.

2. If it is due by the law of nature, or as it is called by juriſts the law of nations. *L.* 47. (*c*). *ff. de Cond. Indeb.* but is not due by the civil law. *V. C.* 64. *ff. de Cond. Indeb.* (*d*)

3. If it is due by the civil law, but not by the law of nature.

4. If it is due both by natural and civil law, but the debtor may protect himſelf by a perpetual exception.

Exceptions may be diſtinguiſhed into two kinds; for they differ with reſpect to their duration, and their effect.

With reſpect to duration, they are either temporary, or perpetual, or ambiguous, that is, it is doubtful whether they are temporary or perpetual, which commonly depends upon an uncertain

(*a*) Ex his omnibus cauſis, quæ jure non valuerunt, vel non habuerunt effectum, ſecutâ per errorem ſolutione, condictioni locus erit. L. 54. ff. de Condic. Indeb.

(*b*) Utile ab inutili non vitiatur, nec inutile ab utili confirmari poteſt: Sed ſcinditur obligatio.

(*c*) Indebitam pecuniam per errorem promiſiſti; eam qui pro te fidejuſſerat, ſolvit: Ego exiſtimo ſi nomine tuo ſolverit fidejuſſor, te fidejuſſori, ſtipulatorem tibi obligatum fore, nec expectandum eſt ut ratum habeas; quoniam potes videri id ipſum mandaſſe, ut tuo nomine ſolveretur; ſin autem fidejuſſor ſuo nomine ſolverit quod non debebat, ipſum a ſtipulatore repetere poſſe: quoniam indebitam jure gentium pecuniam ſolvit, quo minus autem conſequi poterit ab eo, cui ſolvit, a te mandati judicio conſecuturum; ſi modo per ignorantiam, petentem exceptione non ſummoverit.

(*d*) Vi. infra, in the text.

event. For inſtance, I owe you a ſum of money, and you agree not to demand it, unleſs *Titus* is conſul; if *Titus* dies, the exception becomes perpetual, if he is made conſul, it appears *ex poſt facto* to have been temporary. *Vi. Cuj. ad Leg.* 66. & *L.* 49. *ff. de Cond. Indeb.*

With reſpect to the effect, there are ſome exceptions which altogether deſtroy the natural obligation, others which do not deſtroy the natural but prevent the civil obligation.

An agreement never to ſue, the exception of fraud, of the *Senatus conſultum Velleianum* (*a*), the deciſory oath, are inſtances of the firſt kind.

The exception of the *Senatus conſultum Macedonianum* (*b*), of a judgment. The exception or retention ariſing from the *Faleidian* law, are referable to the ſecond.

Another diſtinction may be deduced from the laws themſelves, *L.* 40. *ff. de Cond. Indeb.* (*c*)

An exception is given either for the ſake of the perſon who is obliged, as the *Senatus conſultum de interceſſionibus* (*d*); exceptions of this kind in the gloſs, and other writings are called favourable.

Or it is given in odium of the perſon to whom the engagement is made: an example of which is the *Senatus conſultum Macedonianum*, and theſe are by the ſame interpreters called odious.

IX. Error of law ought not to give any perſon a title of acquiſition: the reaſon is evident, and *Cujas* comprizes it in a word in his *Commentary on Law.* 8. *ff. de Juris et facti Ignorantia*, "Otherwiſe, an ignorance of the law would be an advantage to the perſon making the miſtake (*e*)." Error would have more

(*a*) The object of the Senatus conſultum Velleianum, was to invalidate engagements entered into by women, on account or behalf of other perſons. I cannot adopt the opinion that an exception founded upon this regulation, which was made on account of a facility aſcribed to the female ſex, of entering into engagements for the benefit of others, diſpenſes with the natural obligation of performing their engagements. But the oppoſite principle certainly ſeems to pervade the *Roman* law upon the ſubject. The deciſory oath is applied when a perſon making a demand offers peremptorily to abide by the oath of the perſon from whom it is made as to the truth of it. See the laſt Section of the Treatiſe on Obligations.

(*b*) The Senatus conſultum Macedonianum (ſo called from Macedo, a famous uſurer) provided that no action ſhould be allowed for money lent to ſons under the power of their fathers. By the *Roman* law, a ſon of whatever age continued under the power of his father unleſs emancipated.

(*c*) Vi. infra.

(*d*) Viz. the Senatus conſultum Velleianum.

(*e*) Alioqui erranti lucro eſſet ignorantia juris.

privileges

privileges than knowledge, and ignorance would be recompenſed, whilſt ſcience would not.

Hence thoſe ſolemn definitions of the law; ignorance of the law does not profit thoſe who are deſirous of acquiring an advantage (*a*). *L.* 7. *ff. de jur. & fact. ignor.*

An error of the law cannot be taken advantage of even by women (*b*). *L.* 8. *ff. Cod.* Ignorance of the law is of no advantage in caſe of uſucaption. *L.* 4. *ff. Cod.* (*c*). *L.* 31. *in pr. ff. de uſurp. & uſucap.* (*d*) *L.* 2. § 15. *ff. Pro. Emp.* (*e*) *& alibi paſſim.*

But this maxim ſeems only to have been contemplated in one point of view. Moſt of thoſe who have treated of it, have only conſidered it in regard to the perſon who falls into an error of law, to whom it is certain that his ignorance can never be of any advantage, but the rule does not appear leſs certain, with reſpect to thoſe with whom another by mere error of law may contract an engagement. I mean it is ſcarcely leſs evident, that an error of law in one party, is not a ſufficient cauſe to afford title and means of acquiſition to another. I ſuppoſe the error in law to be the only cauſe, and the ſingle foundation of the contract or obligation, in a word of the act which is paſſed, and proceeding upon this ſuppoſition, I ſay, that an error cannot profit the perſon who obliges himſelf, neither can it give an advantage to the perſon to whom he is obliged.

OTHERWISE ALL THE PRINCIPLES WHICH WE HAVE JUST PREMISED AS TRUE WOULD BE ABSOLUTELY FALSE; AND YET IT MAY BE OBSERVED, THAT THERE IS NOT ANY ONE OF THEM WHICH IS NOT A FIRST PRINCIPLE OF NATURAL JUSTICE.

It would be falſe, that *equity does not allow one man to enrich himſelf at the expence of another*; that what *belongs to me cannot be acquired by another, without my conſent or fault*; unleſs it can be ſaid, that one who is under an error gives a real conſent, or that the (*loi*) law regards a legal miſtake (*erreur de droit*), as a fault which it

(*a*) Juris ignorantia non prodeſt acquirere volentibus.

(*b*) Juris error nec fœminis in compendiis prodeſt.

(*c*) Juris ignorantiam in uſucaptione negatur prodeſſe.

Uſucaption is a right acquired by a length of poſſeſſion for a certain time by a perſon *bonæ fidæ* believing himſelf to be the owner, and not knowing the right of the perſon really entitled. But if he has a knowledge of the facts upon which that title is founded, it is decided by this text that an ignorance of the legal right reſulting from them is of no avail.

(*d*) Nunquam in uſucaptionibus juris error poſſeſſori prodeſt, et ideo Proculus ait, ſi per errorem initio venditionis tutor pupillo auctor factus ſit; vel poſt longum tempus venditionis peractum, uſucapi non poſſe: quia juris error eſt.

(*e*) Si a pupillo emero ſine tutoris auctoritate, quem puberem eſſe putem; dicimus uſucaptionem ſequi, ut hic plus ſit in re quam in exiſtimatione. Quod ſi ſcias pupillum eſſe, putes tamen pupillis licere res ſuas ſine tutoris auctoritate adminiſtrare, non capies uſu quia juris error nulli prodeſt.

puniſhes

puniſhes by the loſs of the property, that was the ſubject and occaſion of it. But the firſt cannot be maintained, and how is it poſſible to prove the ſecond? Even ſuppoſing that a perſon who miſtook the law deſerved to loſe his property, how could that prove that the other deſerved to gain it? And that for this ſingle reaſon, that the perſon who erred was not acquainted with his right. In a word, who will maintain that for this error, the one deſerved to be ſtripped of the property which belonged to him, the other to be inveſted with that which did not?

This is not all; it muſt be further maintained, that an obligation without any cauſe, or founded upon a cauſe which was falſe, unjuſt, and illegitimate, could be valid; that that which is null could produce effects, that the law could not eſtabliſh that favourable remedy, to which it gives the name of *condictio ſine cauſa*, or *condictio indebiti*, and that thus converting all obligations without cauſe into forced donations, it regarded all thoſe who contracted from error in point of law as real donors.

To avoid all theſe inconveniences, nothing is more ſimple than to give the rule of law all the extent of which it is capable. *Error juris in compendiis non prodeſt*; then it is of no advantage to either party, *neque reo neque ſtipulatori prodeſt*, to the one, becauſe it is not juſt that his fault ſhould be of any ſervice to him, and that he ſhould derive an advantage from his own error; to the other, becauſe there is not a ſingle law in the whole ſyſtem of juriſprudence, which eſtabliſhes that an error of another ſhall of itſelf, and without any other cauſe, be a legitimate title and a juſt means of acquiſition.

All theſe principles being allowed, it appears eaſy to decide what are the conſequences which ought to reſult from an error of law.

For 1ſt, The queſtion relates either to acquiring, or to loſing.

If it relates to acquiring, an error of law is neither an excuſe, nor a title, except to minors and others, who are aſſiſted even in reſpect to gain, *niſi minoribus aliiſque quibus etiam in lucro ſuccurritur. L. 7. § 6. & ſeq. de Minor.*

And in this principally conſiſts the difference, between error of law and error of fact. In error of fact, (ſays *Cujas ad L. 8. ff. de jur. & fact. ignor.*) there is not any diſtinction between gain and loſs, in error of law there is (*a*). See *L. 1. 4. 8. ff. de jur. & fact. ignor.*

When the queſtion relates to keeping, or to avoiding the loſs of

(*a*) In errore facti non diſtinguuntur damna a compendiis: in errore juris diſtinguuntur.

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what we already have, the diſcordant opinions of the interpreters can ſcarcely or not even ſcarcely be reconciled (*a*); and leaſt you ſhould accuſe the modern interpreters alone, you may conſult the *Baſilican* interpreters, among whom there is a very great diſſenſion upon this ſubject.

For they expound the words in *L.* 7. *ff. de jur. & facti ignorantia*, that an ignorance of law does not injure thoſe who are ſeeking their own (*b*), as follows:

For inſtance, a perſon ſtipulates for a ſlave to be given to him of the value of twenty guineas; the ſlave being dead before any delay, the promiſer ſuppoſing himſelf to be ſtill bound by the ſtipulation, pays the twenty guineas. The law aſſiſts him, becauſe his claim is founded upon the loſs of the money, and he is entitled to repetition.

The error is manifeſtly an error of law. The promiſer is ignorant of that trite and common rule; that the debtor of a ſpecific thing is liberated by its happening to periſh if he is not guilty of any delay in the delivery.

But becauſe the queſtion relates to avoiding a loſs, the error of law does not prejudice him; nay even though the money was actually paid, it may be reclaimed, which is particularly worthy of obſervation, as we ſhall obſerve in the ſequel.

But in the following article, the *Baſilican* interpreters ſeem to have taken up quite the oppoſite opinion; for they ſubjoin theſe words, *except thoſe who pay what is not due from an ignorance of the law*, as in *L.* 1. *Cod. p.* 18. *Anatolius* ſays, a perſon who pays money which is not due through ignorance of the law, has not a right of repetition, but if he pays it through an ignorance of fact he has (*c*).

Quo teneam vultus mutantem Protea nodo. But who ſhall wonder at ſo great a diſcord amongſt the interpreters of the laws? For the laws themſelves appear to be diſcordant with each other.

For *Diocleſian* and *Maximian* ſtate in the law, *Cum quis.* 10. *Cod. de jur. & fact. ign.*

That where a perſon ignorant of the law, pays money which is not due, the right of repetition ceaſes, for repetition is only allowed in caſes where what is not due is paid in conſequence of an error

(*a*) Vix ac ne. vix pugnantes interpretum ſententiæ in concordiam reduci poſſe videntur.

(*b*) Juris ignorantia ſuum petentibus non nocet.

(*c*) Excipe eos qui jus ignorantes indebitum ſolverint. Ut L. 1. &c. Anatolius ait, Qui per errorem juris indebitam pecuniam ſolvit, non repetit; ſin autem per ignorantiam facti, repetit.

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in fact (*a*). Here the various ways in which a thing is not due are not diſtinguiſhed; but it appears clear that whatever is paid, through an error of law, without being due, cannot be reclaimed, and that there is no right of repetition, except for what is paid in conſequence of an error in fact.

But the very title of the *ff. & Cod. de condictione ſine cauſa* ſhews the contrary; for it is an undoubted principle of law, that what is promiſed either without a cauſe, or for an unjuſt cauſe, may be recovered back. See *ſupra*, No. VI. (p. 411.)

Add. law 40. *ff. de Cond. Indeb.*

" He who has a perpetual exception may reclaim what is paid by error. But this is not perpetual: for if the exception is given for the ſake of him with whom the conteſt is, as in the caſe of the *Senatus conſultum Velleianum*, the payment may be reclaimed; but where the exception is given in odium of him to whom the money is due, there is no repetition; as if a ſon under the power of his father, takes money by way of loan contrary to the *Senatus conſultum Macedonianum*, and after he is his own maſter pays it, he has no right of repetition (*b*)."

In this law every body will eaſily perceive the queſtion to relate to error of law, who obſerves,

1. That it is evidently to be collected from the very tenor of the words, that the perſon who paid was ignorant that he might protect himſelf by a perpetual exception. *Qui exceptionem perpetuam habet, ſolutum per errorem repetere poteſt.* Therefore what is paid by error or ignorance of the exception may be reclaimed. This is the ſenſe which the words taken in themſelves ſeem to bear; but if a perſon is ignorant that he has a perpetual exception, of what is he ignorant but the law?

2. That this manifeſtly follows, not only from the words but alſo from the very reaſon of the law; for what diſtinction does the juriſt uſe to explain the diſtinction between thoſe exceptions of which an ignorance does prejudice, and thoſe of which it does not? Does he ſeparate an error of fact, from an error of law? On the contrary, he plainly joins them together when he ſhews, that the ſtreſs of the queſtion is placed in the very nature of the exceptions themſelves; that ſome are favourable, which, ac-

(*a*) Cum quis jus ignorans indebitam pecuniam ſolverit, ceſſat repetitio: per ignorantiam enim facti repetitionem tantum indebiti ſoluti competere tibi notum eſt.

(*b*) *Qui exceptionem perpetuam habet, ſolutum per errorem repetere poteſt.* Sed hoc non eſt perpetuum; nam ſi quidem ejus cauſa exceptio datur cum quo agitur, ſolutum repetere potest, ut accidit in Senatus Conſulto (nempe Velleiano) de interceſſionibus, ubi vero in odium ejus, cui debetur, exceptio datur, perperam ſolutum non repetitur, veluti ſi filius familias contra Macedonianum, mutuam pecuniam acceperit, et Paterfamilias factus ſolverit, non repetit.

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cording to *Cujas*, deſtroy even the natural obligation; others odious, which are rather detrimental to the creditors, than profitable to the debtors, introduced not in favour of the later, but in odium of the former, and which therefore only deſtroy the civil action, and not the natural obligation.

From this rule, almoſt all the diſtinction between law and fact is a departure (*exulat*), it fully appears, that this famous diſtinction has no place in the rule itſelf, which is entirely founded upon different principles.

Therefore, this diſpoſition may be extended to error in law. This may alſo be collected from *Cujas ad leg.* 66. *ff. de Cond. Indeb.*

In addition to this, the right of reclaiming what is paid without being due, is not founded upon any poſitive law or edict, but was introduced into practice by adopting the principles of natural equity; for nothing is more repugnant to equity, than that what is paid without being due in any manner, ſhall not be ſubject to be reclaimed. And as this action (as *Papinian* ſays) reclaims what belongs to one perſon, and is without cauſe in the poſſeſſion of another, why ſhall it not revoke what is given by error of law? For an error of law can never be allowed as any cauſe.

Laſtly, *Papinian*, the life (*viva vox*) and oracle of *Roman* juriſprudence, conſiders himſelf as having embraced the whole ſubject by a ſingle diſtinction, in *L.* 7. & 8. *de jur. & fact. ignor.*

An ignorance of law does not thoſe avail, who are deſirous of acquiring, but does not injure thoſe who merely ſeek their own. *L.* 7. (*a*).

An error in law does not ſubject any perſon to the injury of loſing his property (*b*). *L.* 8.

Therefore wherever the queſtion relates to avoiding or repairing a loſs, an ignorance of the law does not induce any prejudice.

This being the caſe, who will ſupport on the one ſide, *Dioclefian* and *Maximilian*, plainly maintaining that money paid by an error of law cannot be reclaimed; and on the other ſide, the juriſts and the ſpirit of equity itſelf, exclaiming that an error in the law ſhall not injure thoſe who are ſeeking their own, or, which is the ſame thing, ſhall not injure any perſon in regard to the incurring a loſs.

(*a*) Juris ignorantia non prodeſt acquirere volentibus, ſuum vero petentibus non nocet.

(*b*) Error facti ne moribus quidem in damnis vel compendiis obeſt, juris autem error nec fœminis in compendiis prodeſt. Cæterum omnibus juris error in damnis amittendæ rei ſuæ non nocet.

The gloſs, and the doctors of that ſtamp, (*aſſecle*,) which was the caſe with almoſt all before the time of *Cujas*, would avoid this antinomy, by holding that the term *indebiti* in the law, is to be taken not generally, but ſtrictly. *Cum quis C. de Cond. Indeb.*

A diſtinction is therefore to be taken according to the gloſs, and the common opinion of interpreters.

The diſpute relates either to money, which, is due naturally, but not civilly, and then what is paid by an error in fact may be reclaimed, what is paid by an error in law cannot.

Or, on the other hand, it relates to what is due civilly, but not naturally, and in that caſe what is paid may without diſtinction be recovered back.

Or what is paid is not due, either civilly or naturally, and in like manner may without diſtinction be recovered back.

Or laſtly, it was due both by natural and civil law, but by means of an exception, was in the ſame predicament as if it had not been due; and in this caſe the exception was either dilatory, perpetual, or doubtful.

If it were dilatory, an error of law would prevent the repetition, an error of fact would not.

If perpetual, there is a further diſtinction; either the exception is favourable, and what is paid may be reclaimed, whether paid by an error of law or fact; ſuch as the exception of *Senatusconſultum Velleianum*. Or it is odious, and the money which is paid may be reclaimed, if paid by an error of fact, if by an error in law it cannot. Such is the *Senatusconſultum Macedonianum*.

Laſtly, if the exception is doubtful; the right of repetition attaches without diſtinction.

In this diſtinction of the gloſs, which, as uſual, flows rather muddily (*lutulenter*), there are many things to admit, and many to reject.

Its denial that the law of *Diocleſian* and *Maximilian*, extends to the payment of what is not due, either civilly or naturally, is to be very particularly attended to, as we ſhall mention hereafter.

But the poſition that what is naturally due, may be reclaimed when it is paid from an error of fact, as if a perſon under an error of fact, pays money which he could retain by virtue of the *Senatusconſultum Macedonianum*, is, as we ſhall prove, plainly and evidently repugnant to all the principles of law.

The further obſervation that what is due civilly, but not naturally, may be reclaimed whether paid by an error of law or of fact, ſeems altogether dubious and obſcure, not to ſay falſe; but of this alſo hereafter.

If

If we are unwilling to follow the authority of the gloſs, which is ſo egregiouſly erroneous, the diſtinction of *Cujas* is next to be conſidered, and very attentively examined.

It occurs *in Leg.* 8. *ff. de jur. & fact. Ignor. Lib.* 1. *Quæſt. Pap.*

It alſo occurs *in L.* 7. *eod Lib.* 19. *Quæſt. Papin.* where *Cujas* does not ſeem to agree with himſelf.

When he afterwards expounds the ſolemn, and often repeated (*decantatam*) diſtinction between law and fact, and gain and loſs, he concludes as follows:

In reclaiming what is paid without being due, an error of law is injurious: for neither a man or a woman can reclaim what is paid, through an ignorance of law, as in *L.* Regulæ. § *Penult, & Ult. de jur. fact et ign. L.* cum quis Cod. *eod. L.* Error, *Cod. ad. Leg. Falcid* (*a*). For the object of a perſon who reclaims what he has paid, is to regain what he has loſt, not to avoid loſing what belongs to him, and then his ſolicitude relates to gain and not to loſs. A perſon miſtaking the law is aſſiſted ſo far as that he ſhall not loſe, not ſo far as that he ſhall be relieved from having loſt; for a perſon who endeavours to recover what he has already loſt, is ſeeking for a gain, and not guarding himſelf againſt a future loſs (*b*).

The diſtinction of *Cujas* then comes to this; that if the error of law appear before the payment, there is a right of retention, ſo that the error ſhall not hurt; but if the payment is compleat, if the loſs has happened, if the object of a perſon miſtaking the law, is not that he may keep what is his own, but that he may recover that which is now become another's, then he comes too late, as he can only complain of having been deceived and circumvented by himſelf.

Which diſtinction, although at firſt view it may ſeem reaſonable, yet upon a further examination, will be thought hard and unjuſt, and not leſs contrary to the authority of the laws, than to the principles of right and equity.

For it is repugnant,

(*a*) In all theſe laws, except the law *cum quis*, the queſtion relates to perſons who had paid the entire amount of legacies, from which they were entitled to deduct the fourth part, as the Falcidian portion.

(*b*) Item condicentibus indebita ſoluta juris error nocet: nam neque mas, neque fœmina poteſt condicere, quod indebitum per juris ignorantiam ſolvit; ut in *L. Regula*, § penult. & ult. ff. de jur. & fact. ignor. *L. cum quis* (*), Cod. eod. *L. error*, C. ad Legem Falcidiam: quia condicit quod ſolvit; id agit ut acquirat quod amiſit, non ut, quod ſuum eſt, non amittat denique ſollicitus eſt de lucro, non de damno. Erranti in jure ſubvenitur ne ſuum amittat, non etiam ne amiſerit; ne damnum faciat, non etiam, ne fecerit: damna facta quia infecta facere ſtudet, lucrum captat, non damnum facturum amolitur.

1ſt, To the law itſelf which *Cujas* interprets; for what ſays *Papinian*? *Omnibus juris error in damnis amittendæ rei ſui non nocet.* There clearly all the diſtinction ceaſes. Whoever contends for avoiding a loſs, is not injured by an error of law. The reaſoning of *Cujas* is obviouſly too ſubtle, for any body to be deceived by it; for he diſtinguiſhes between a perſon guarding againſt a future loſs, and one who endeavours to repair a loſs already incurred; as if a perſon having loſt what was his own, were catching at a gain in aiming at its recovery; or, as if the juriſt, whenever there is a queſtion of loſs, had ſeparated an impending loſs from an exiſting one.

But if the words of *Papinian* ſeem to favour the opinion of *Cujas*, (for he ſays, that error does not hurt *in damnis rei ſuæ amittendæ*, which words in a certain degree ſeem to include the future but not the paſt,) let him read the ſame law in the *Baſilicans*, where the ſame words are thus rendered: an ignorance of the law induces no hurt to any one wiſhing to ſeek his own, *juris ignorantia in damno nemini nocet ſuum petere volenti*, or, as it is in the Greek, τὸ ἴδιον ἀπαιτῆσαι *proprium repetere*, for that is the genuine ſignification of τὺ ἀπαιτῆσαι.

But *Cujas* denies that that can be called mine which I have already paid to another: for it has already become the property of the other perſon, therefore when I reclaim it I am demanding what is not mine but his.

This is plainly an empty ſubtilty, as will eaſily appear to any perſon who attends to it. But that the whole of this quibble (*cavillatio*) may be more compleatly deſtroyed, we muſt examine upon what reaſon of law the right of reclaiming what is unduly paid is introduced; whether it is becauſe the money that was not due remains, even after payment, the money of the perſon making the payment; or becauſe equity will not allow any man to increaſe his affluence with the ſpoils of another, and to enrich himſelf by another's detriment, (*alienis ſpoliis diteſcere et cum alterius detrimento locupletiorem fieri*,) notwithſtanding what he has received may by ſubtilty be denominated his own.

If the firſt reaſon is preferred, the argument of *Cujas* will hold good: for who can doubt but that money which is paid immediately becomes, *ſummo jure*, the property of the perſon receiving it? But if this is allowed, the repetition of what is unduly paid (*condictio indebiti*) will almoſt entirely ceaſe in every caſe whatever; for whether it is paid by error of fact, or by ignorance of law, the ſame principle will equally apply: for it is plain, that the thing paid is not now mine but another's. And it is not neceſſary to go far for arguments, by which this may be demonſtrated; for the very

very term *condictio* alone is ſufficient to manifeſt it. For when a perſon ſues for his own, he is ſaid, not *condicere* but *vindicare*, and the owner never uſes a condiction except in an action of theft; and this is in odium of thoſe who are guilty of theft, and who are liable in ſeveral different kinds of action, as *Juſtinian* ſays. *Inſtit. de Act.* § 14. If therefore it can be indiſcriminately ſaid, of every *condictio indebiti*, that it is a repetition of a thing which has now become the property of another; either the action muſt be entirely aboliſhed; or it muſt be confeſſed that it cannot be rightly withheld from a perſon miſtaking the law, merely upon the pretext, that he is ſuing for what is not his own, but another's.

It ſeems therefore, that we muſt adhere to the other opinion and rather ſay, that the action is comprized in this ſingle principle; that it is naturally unjuſt, that what belongs to one man ſhould without cauſe be detained by another; which reaſon equally applies in favour of every perſon acting under an error, whether of fact or law, and therefore it cannot eaſily be explained, why the repetition ſhould be denied in the one caſe, and allowed in the the other; certainly *Cujas* does not explain it, by the ſubtilty, that the money which is already paid does not belong to the payer, but to the receiver.

But what he ſubjoins, that a right of repetition is not allowed in caſe of an error of law, becauſe the perſon who ſues for what is another's, is catching at a gain (*lucrum captat*), cannot be very eaſily proved to thoſe who prefer the principles of right and equity to the ſubtilties of law:

For although it may with ſome degree of ſubtilty be ſaid, that a perſon ſeeking to recover what he has loſt, is catching at a gain, yet in truth he only deſires to repair an injury which he ſuffers; he ſues that he may not continue to ſuffer a loſs, not that he may acquire a gain (*ne perdiderit, non ut lucretur*). But what is the difference, if you merely attend to natural equity, between a loſs which is future and one which is paſt; ſo that a perſon who is repairing a loſs already paſſed, ſhall be ſaid to acquire a gain, and one who wards off a loſs that has not arrived, ſhall only be ſaid to avoid a loſs? Neither of them acquires any thing, neither of them is made any richer; the one endeavours not to loſe, the other to be relieved from having loſt; the one, whilſt the loſs is ſtill impending, keeps what he was about to have loſt, the other recovers what he has already loſt without a cauſe. Each protects himſelf by the ſame oracle of the law; that ignorance of the law ſhall not injure any one in matters of loſs.

This was perceived by *Cujas* himſelf; who may be called at once the maker and deſtroyer of the diſtinction.

For when the diſcuſſion relates to a woman, who being ignorant of the law, and not knowing that ſhe is entitled to a preference in claiming her portion, allows the other creditors to be ſatisfied. *Cujas ad eand. Leg.* 8. *de jur. & fact. ignor.* plainly and ingenuouſly acknowledges, that ſhe ſhall recover her portion from theſe creditors, leſt her error ſhould ſubject her to the injury of loſing it, *ab eis creditoribus mulierem dotem ſuam revocaturam, ne in damno amittendæ dotis ſuæ error ei noceat.*

But in this caſe it is plain,

1ſt, That the queſtion relates to a loſs which is paſt. This appears as clear as day, from the words of *Cujas* himſelf.

2d, In this point there is no diſtinction between men and women; for error of the law is of no avail to women with regard to gain, nor any prejudice to men with regard to loſs.

Therefore by the judgment of *Cujas* himſelf, it is rightly collected from this example.

1ſt, That he who ſtudies to repair a loſs already incurred without cauſe, does not ſeek to acquire a gain; for if in fact he was catching at a gain, no aſſiſtance would be given to a woman ſuing for a repetition of her portion, as in that caſe her error in law would be an advantage to her.

2d, That it is in vain to make any diſtinction here between paſt loſs and future; when *Cujas* himſelf acknowledges that an action of repetition is allowed to a woman, not under the apprehenſion of a loſs, but having actually ſuſtained one.

And it is plain enough that *Cujas* would never have thought of this diſtinction, between paſt loſs and future, unleſs he had been apprehenſive of overturning the deciſion of the law, *Cum quis*. For when this law plainly ſaid, that what was paid by an error could not be recovered; and *Papinian* on the other ſide anſwered, that error of the law ſhould not hurt any one in matters of loſs, it would ſeem at firſt, that he who paid what in reality was not due ſuffered a loſs, and therefore ſhould not be affected by an error of law; *Cujas* thought he could not get over this difficulty otherwiſe than by ſaying, againſt all natural equity, that a perſon endeavouring to repair a loſs, is catching at a gain. Such then is the whole origin of the ſcholaſtic diſtinction, which even *Cujas* himſelf did not ſteadily maintain (*vix ac ne vix conſtanter tenuit*).

For the ſame perſon who found out this diſtinction, in commenting upon *L.* 7 & 8. *ff. de jur. & fact. ignor.* when he treats of *L.* 66. *ff. de Condic. Indeb.* as if overpowered by natural equity, confeſſes that he who pays what is not naturally due, though it might be legally recovered, is entitled to a repetition, *Qui tutus ea*

exceptione

exceptione (i. e. an exception which deſtroys a natural obligation,) *per errorem ſolvit, repetit; quia non debuit naturâ.*

But he is much more at variance with himſelf in one and the ſame diſcuſſion, viz. *ad L. 7. ff. de jur. & fact. ign.*

For in the beginning of this inquiry, he rightly diſtinguiſhes between injuries, with reſpect to which an error of law binds a man to his prejudice, and other caſes in which (ſays he) it does not hurt; as if I pay by ignorance of the law what is not due, a claim of repetition is not to be denied, that is to ſay, if I owe it neither naturally nor civilly, *ut ſi indebitum ſolverò per juris ignorantiam, non mihi ideo deneganda eſt condictio, puta, ſi id nec naturaliter nec civiliter debui.*

And yet a little afterwards, when he caſts his eyes upon the law *ſi quis*, his fear of allowing the exiſtence of an antinomy, makes him fall into the groſſeſt contradiction, for he concludes the whole diſputation as follows:

"In this queſtion of *condictio indebiti*, that is called *indebitum*, which is not due by any kind of law, that is, the difference is between error of fact, and error of law, ſo that what I do not owe by any law either civil or natural may be reclaimed, if paid by an error of fact, but not if paid by an error of law." (*a*)

How then ſhall this reconciler of laws be reconciled with himſelf?

2d, The diſtinction of *Cujas* is not only repugnant to the law which he interprets, but alſo to ſeveral others; a few inſtances will be ſubjoined.

And in the firſt place, all the laws which ſpeak of the *condictio ſine cauſa*, are in oppoſition to the diſtinction of *Cujas*, until it ſhall be proved that an error of the law is to be accounted as a juſt and legitimate cauſe of payment.

Next may be adduced the laws already cited with commendation, which expound the principles of the *condictio indebiti*, and in which it is frequently indicated that this action was introduced upon the ground of right and equity, to recover what belonged to one perſon and was held without any ſufficient cauſe by another.

But that ſomething more particular may be ſtated, we ſhall firſt take notice of *L. 46. ff. de jur. Dot. L. 64. ff. de Condict. Indeb. & L. 29. § 5. ff. Mandati.*

In *L. 46. § 2. de Jur. Dot.* are theſe words, *pater etiamſi falſo*

(*a*) In hac quæſtione de condictione indebiti, indebitum dicitur, quod nullo jure debetur, id eſt, in hoc tantum indebiti genere, valet differentia inter errorem facti et errorem juris: puta, quod nullo jure debui nec civili nec naturali, ſi per errorem facti ſolvi, repetam; ſi per errorem juris, non repetam.

exiſtimans ſe filiæ debitorem eſſe dotem promiſiſſet, obligabitur. The father, although he falſely ſuppoſes himſelf to owe the portion to his daughter, ſhall be bound.

Here *Cujas* himſelf takes notice, and properly, that the queſtion relates to a daughter in the power of her father, otherwiſe *Julianus* would not rightly affirm *dotem deberi;* in this caſe therefore, the father being under an error, is only obliged becauſe he is naturally debtor of the portion, and the cauſe of piety is ſufficient to oblige him, although the promiſe was founded in error: but this reaſon would ceaſe in caſe of a daughter who was emancipated; therefore it muſt be agreed that the law refers to the caſe of a daughter remaining part of her father's family.

But if we once admit this, it follows that we muſt confeſs the queſtion to relate to an error of law; for between a father and a daughter remaining under his power no obligation could ſubſiſt, no action could be maintained, the father who ſuppoſed himſelf to be indebted to his daughter, could not be under any error except in point of law; for although the fact was doubtful, yet the whole ſubject depended on the law, as the father ought to have known the fact, and if he conſidered himſelf to be certain in reſpect of that, he ought not to be ignorant that an obligation, which in fact was entered into between a father and a daughter, was void in law; therefore whether there was or was not any error of fact admixed with the error of law, is of little conſequence, ſince in either caſe the ſubject is reduced to an error of law.

Neither can it be ſuppoſed, that the father was debtor to the daughter without prejudice to the right of paternal authority, as in the caſe of her poſſeſſing adventitious property: for in the time of *Julianus*, who is the author of this law, the name adventitious *peculium* was ſcarcely known in the law, and to uſe the words of *Juſtinian* in § 1. *Inſtit. quib. alien. licet vel non—Olim quidquid ad filios pervenerat, exceptis videlicet caſtrenſibus peculiis, hoc parentibus ſuis acquirebant ſine ulla diſtinctione, et hoc ita parentum fiebat, ut etiam eſſet eis licentia alio filio vel extraneo donare vel vendere, vel quocumque modo valuerant, applicare.* For *Conſtantine* firſt made an exception of the property coming from the mother, of which he ordered that the uſufruct only ſhould be acquired by the father; ſucceeding emperors made other additions which it would be ſuperfluous to particularize. It is certainly clear, that previous to the time of *Conſtantine*, nothing but the *caſtrenſe peculium* (*a*) was exempt from the parental authority, and it was impoſſible for that to belong to a daughter.

(*a*) The property given to a ſon under the authority of his father, for the purpoſes of war, or acquired by him in war.

Therefore,

Therefore, to return to the ſubject, the law relates to a daughter under the authority of her father, therefore the father was under an error of law. For what reaſon therefore is he obliged? Becauſe he erred in the law? By no means; but becauſe he diſcharged a natural duty: for this is the true reaſon of the law which *Cujas* himſelf embraces, and which may be collected from or rather is proved by the very rubric (title), under which the law is placed: but if the father remain ſubject to the obligation, upon the ground of his having miſtaken the law, the ſame thing muſt be decided in the caſe of a father who had emancipated his daughter, but it applies ſpecially and excluſively to a father retaining his parental authority, therefore the error of law is little regarded, and the father is obliged not on account of the error, but on account of the natural duty.

A much ſtronger argument in a caſe nearly ſimilar, may be drawn from law 64. *de Cond. Indeb.*

The words of the law are:

Si quod Dominus ſervo debuit, manumiſſo ſolvit, quamvis exiſtimans ei ſe aliquâ teneri actione tamen repetere non poterit, quia naturale agnovit debitum: ut enim libertas naturali jure continetur, et dominatio ex gentium jure introducta eſt, ita debiti vel non debiti ratio in condictione naturaliter intelligenda eſt.

Certainly an excellent law, and which ſeems to remove all ambiguity from this queſtion.

That the caſe refers to a manifeſt error of law is indubitable. For the maſter ſuppoſed himſelf to be liable to the ſlave in ſome action, which opinion doubtleſs deſerves the name of careleſs, and groſs, and ſupine ignorance, (*ſolutæ, et craſſæ, et ſupinæ ignorantiæ,*) terms derived from the laws themſelves. Does *Tryphonius* the author of the law impute that to the maſter? By no means, he does not pronounce that the right of repetition ſhall be taken away, becauſe the maſter miſtook the law, and becauſe aſſiſtance is to be given not to folly but only to error; but ſolely becauſe the maſter acknowledged a debt due by the rules of natural equity (*quia Dominus naturale agnovit debitum*).

Therefore, on the contrary, it may be concluded, that if the debt was not due by the rules of natural equity, if the maſter was not bound by any kind of law, he might reclaim what he had paid.

For who can imagine that *Tryphonius* would have paſſed over ſo plain and ready a ground of deciſion, if it were clear that a payment once made by an error of law, of that which was not in any manner due could not be reclaimed?

But the juriſt not only reſolves the queſtion propoſed, but lays down

down a new and general rule of law, by the assistance of which all questions that can arise in the discussion of this subject, may be easily decided.

This rule is explained by an elegant distinction: liberty, says he, is a natural right, that is, all men are naturally free; therefore all men are bound by the ties of natural obligation; on the contrary, servitude *is introduced by the law of nations*, (*ex jure gentium introducta est*,) by which alone the contracting with slaves is prohibited, so that they can neither be obliged to others, nor have others under an obligation to them: therefore, two kinds of obligations may be distinguished, the one merely founded on the law of nature, the other on the law of nations or civil law; slaves are incapable of the latter, but not of the former: but from this example, it may be asked whether the term *indebitum* can also be taken in a two-fold sense, viz. naturally and civilly? and this is also supposed by *Tryphonius*, who having considered all these points, at last pronounces generally that the term *indebitum*, whenever the question relates to this right of repetition, is to be understood of what is not due by the laws of natural obligation. *Debiti vel non debiti ratio in condictione naturaliter intelligenda est.* Hence also follows what the jurist had answered in the beginning of the law; that the right of repetition ceases whenever there is a natural obligation, but that it subsists wherever there is not so much as a natural obligation, and in the application of this rule every legal subtilty is rejected: for the terms here are to be understood not civilly, but naturally: and wherever the jurists use the term *indebitum* generally, they are understood to mean what is not even naturally due, that is to say, when they affirm that it may be reclaimed; but when they deny the right of repetition, the term *indebitum* is often used to import what is not due by the civil law, but may be due by the law of nature, of which several instances will be mentioned in the sequel.

An argument not very different from the preceding, is afforded by the law 40. *ff. de Cond. Indeb.* already stated; and which is repugnant to any distinction between law and fact, and the whole is said to depend upon whether the person making the payment, was or was not indebted by the rules of natural justice.

A third argument is afforded by the law 29. § 1. & 5. *ff. Mandati.*

In § 1. it is asked whether a surety, who was ignorant that the obligation was of no effect, has an action against the principal, and the jurist makes a distinction, that if he was ignorant of fact, this ought to be allowed, but if he was only ignorant of the law it ought not (*si quidem factum ignoravit, recipi ignorantiam ejus potest, si vero jus, aliud*

aliud dici debet) and this very properly: for it would be abſurd, that by an error of the law a right of action ſhould be acquired againſt a perſon who being ignorant of the error, could not occaſion the right of action.

But having in the beginning of the law, and in the ſubſequent ſections, propoſed various caſes, he ſeems in § 5. to comprize them all generally, ſo as to ſtate at once what is equitable in all caſes; for he ſpeaks as follows:

In omnibus autem viſionibus ſeu queſtionibus quæ propoſitæ ſunt, ubi creditor vel non numeratam pecuniam accepit, vel numeratam iterum accepit; repetitio contra eum competit, niſi ex condemnatione fuerit ei pecunia ſoluta; tunc enim, propter autoritatem rei judicatæ repetitio quidem ceſſat, ipſe autem ſtellionatus crimine propter ſuam calliditatem plectitur.

Therefore the gloſs infers, that as the caſe of ſurety, paying from an ignorance of the law is propoſed among other caſes, that what is paid without cauſe even by a perſon miſtaking the law, may be reclaimed although the ſurety does not acquire an action *mandati* againſt the principal,

But this argument is weakened, principally by two reaſons.

1ſt, Although the words of the juriſt ſeem to be altogether general, and to apply equally to every thing which he has ſaid before, yet this generality appears to be reſtrained by the words which follow; for he does not ſimply pronounce that in all theſe views, &c. but he immediately ſubjoins whether the creditor receives money not numbered or receives it twice, which words certainly ſeem to derogate from the effect of the former, and thus to limit the anſwer of *Ulpian*, ſo that it is not to be carried beyond theſe two caſes; of paying money not numbered, and paying twice over.

2d, The words upon which the interpretation of the gloſs principally relies are wanting in the *Baſilica*; but if they were of ſo much weight as the gloſs ſuppoſes, the compilers of the *Baſilica* would never have omitted them. However this may be, *Cujas, ad dict. L. 7. ff. de jur. et fact. ign.* certainly condemns the interpretation of the gloſs.

3d, The interpretation of *Cujas* ſeems to be repugnant to equity itſelf, but as this has been already demonſtrated in ſeveral places, while we were engaged in other parts of the diſcuſſion, it would be ſuperfluous to enlarge upon it here.

4th, *Cujas* is in oppoſition to almoſt all the interpreters of the law, who in this reſpect follow the gloſs, at leaſt if we attend only to the queſtion whether what is paid, without being even naturally due, is ſubject to repetition?

Theſe

Theſe arguments may indeed be oppoſed to the diſtinction of *Cujas*; but what do they avail if the law plainly and explicitly decides, without any diſtinction or exception, that he who being ignorant of the law pays money which is not due, is not entitled to repetition? *L. Cum quis.* 10. *Cod. de jur. et fact. ign.*

In vain therefore are the doctors, in vain is equity, in vain are the conflicting opinions of the laws, in vain is the rule of *Papinian* itſelf oppoſed to *Cujas*, when he ſupports himſelf by the clear and evident deciſion of the law.

Therefore we muſt either aſſent to the opinion of *Cujas*, or diſallow the authority of the law, or apply a more commodious interpretation to it, whereby its ſtrictneſs may be tempered with equity.

This was ſeen by *Johannes Robertus Sentent. Jur. Lib.* 1. *cap.* 66. *et ſeq.* who entered upon the right way for reconciling the difference in propoſing this diſtinction.

We either conſider an ignorance of the law ſimply, and regard the cauſe of it as deſtitute of all favour and aſſiſtance of equity, and then we are of opinion that no repetition ſhould be allowed under pretext thereof. *Aut ſimpliciter juris ignorantiam ſpectamus illiuſque cauſam omni æquitatis auxilio et favore deſtitutam adjudicamus; et tunc ejus prætextu repetitionem dari nunquam exiſtimabimus.* A perſon is not to be aſſiſted by the application *ſummi juris*, who alleges himſelf to have failed from an ignorance of the law.

Or we look into the rules of natural equity, on which the whole law of repetition is founded, and then we admit the right of reclaiming of what was not naturally due, although paid under an error of the law. *Aut vero ipſam naturæ æquitatem inſpicimus, quâ ſcilicet tota condictio indebiti continetur, et tunc repetitionem pecuniæ naturaliter indebitæ, quamvis errore juris ſolutæ, dari agnoſcimus*: not on account or for the ſake of this ignorance, or becauſe that ought to afford any benefit, but from a conſideration of what is equitable and right; as it is naturally unjuſt, that one man ſhall without cauſe be enriched by the ruin of another: wherefore the right of repetition, (*condictio,*) as it repels that injury, is called by juriſts a natural right.

But if this diſtinction is approved, the ſolution of the law which is oppoſed to it will be very eaſy.

For it muſt either be ſaid, that the queſtion in that law relates to ſtrict right, the error of law being alone regarded, without reference to the principles of equity, and without impugning the rule, that what belongs to me cannot be transferred to another without my conſent or default.

Or the term *indebitum*, which in itſelf is equivocal and ambiguous,

guous, as is obvious to every body, muſt be underſtood to refer, in the law in queſtion, to that which in truth is naturally due; but cannot be civilly enforced; for if this were paid by an error of law it cannot be reclaimed; both becauſe there was a cauſe for the payment, which prevents the repetition, and becauſe the debtor appears by the payment to have acknowledged the natural obligation.

But to this interpretation it may be oppoſed, that if it were admitted, the term *indebitum* would be uſed in different ſenſes in the law; for in the firſt part of the law, it would mean what was naturally though not legally due (*a*); and in the ſecond part, where it is ſaid, *per ignorantiam facti tantum indebiti ſoluti repetitionem competere*, the ſame term would deſignate what was not even naturally due. For if it were naturally due, it would be hardly poſſible to ſupport what the emperors anſwer in the ſame law, that having been paid by an error of fact it may be reclaimed: for whether my recognition of what is really a natural obligation, ariſes from an error of fact or an error of law, it ſeems to be an undiſputed principle of law, that I am not entitled to repetition.

If therefore this ſecond ſolution is inadmiſſible, we muſt apply a third, and freely acknowledge, that this law is not to be taken abſolutely, (*præfracte accipiendam*,) as if the emperors had intended altogether to include (*excutere*) every kind of *indebitum*, (nor does the diſcuſſion relate, directly at leaſt, to *indebita*,) but meant to propoſe a general rule concerning error of fact, and error of law; and to declare, that what was paid without being due might be reclaimed, if paid by an error of fact, otherwiſe if paid by an error of law; but to leave it undefined, what kind of *indebita* ſhould be included in the rule, as that was not the ſubject in queſtion.

But it will be aſked, what diſtinction will remain in the *condictio indebiti*, between error of law and error of fact, ſo that we can properly ſay with the emperors, that what is paid by an error of law cannot be reclaimed; but what is paid by an error of fact may?

For the money or other thing is either naturally due, or it is not; if it is, it is to no purpoſe to diſtinguiſh between error of law and error of fact; for there is no right of repetition in either caſe; but if it is not, the right ought in either caſe to be admitted.

To ſatisfy this queſtion, it muſt, above all things, be acknowledged, that if there was no caſe in which, what was naturally due could be recovered back after having been once paid, the diſtinction

(*a*) Cum quis jus ignorans indebitam pecuniam ſolverit, ceſſat repetitio.

between

between law and fact would be uſeleſs and unmeaning, at leaſt with regard to the *condictio indebiti*.

But the caſe is far otherwiſe; for it often occurs in the courſe of the law, that what is naturally due may be reclaimed after having been paid.

It will be ſufficient to adduce two examples:

The firſt is the *Lex Falcidia* (*a*), in which *Robertus* properly obſerves, that the retention of a natural debt is introduced by the law itſelf; therefore there would have been no right of repetition, after the heir had diſcharged the entire legacies, if a natural debt once paid could never be reclaimed. This, however, is denied by *L.* 9. *Cod. ad L. Falcid.* The ſuppoſition, therefore, that the diſtinction between a natural and a civil debt, is the only one that can prevail in reſpect to this queſtion, is not true; nay, the contrary ſufficiently appears: for here, although a natural debt is immediately in contemplation, yet ſomething further is requiſite to decide whether there is a right of repetition or not, and what is required, except the famous diſtinction between law and fact; by the aſſiſtance of which the emperor *Gordian* decides, whether the heir can reclaim what he has paid to the legatees, beyond the amount of three fourths of the property, for he ſays, as follows: *error facti, quartæ ex cauſa fidei commiſſi non retenti repetitionem non impedit: is autem qui ſciens ſe poſſe retinere, univerſum reſtituit, condictionem non habet; quin, etiamſi jus ignoraverit, ceſſat repetitio?*

Therefore there is no reaſon for conſidering the diſtinction between law and fact, as perfectly idle.

Upon this law it may alſo be obſerved by the way, that it throws a great light upon the law *Cum quis. de jur. & fact. ignor.* for what does it import by the term law (*jus*)? It is the *Falcidian* law, and other proviſions of the ſame kind, by which a perſon may defend himſelf civilly, from the payment of what he naturally owes. But it does not appear at all inequitable, that the debtor ſhall not be allowed a right of repetition, in conſequence of his ignorance of this law, as he is always naturally indebted. Therefore, in like manner, when the law *Cum quis* uſes the term *jus*, that kind of law or right may be underſtood, by which the debtor is allowed the benefit of an exception or retention, and which thus always ſuppoſes the exiſtence of a natural obligation.

A ſecond example may be found in *L. Qui exceptionem*, 40. *ff. de Cond. Indeb. ante*, where it is demanded whether a debtor having a perpetual exception, may reclaim what he has paid by error, and

(*a*) The lex Falcidia protected the heir from paying more than three fourths of the ſucceſſion to the legatees.

the juriſt diſtinguiſhes between whether the exception is introduced in favour of the perſon who owes the money, or in odium of the perſon to whom it is owing? in the firſt caſe, the repetition is allowed, in the ſecond, not; but here there is no diſtinction between a natural and a civil debt, nay the diſtinction is abſolutely diſallowed: for if the only queſtion had been, whether there was a natural obligation or not, it muſt be anſwered indiſcriminately, that there is no right of repetition; for, whether the exception were allowed in favour of the debtor or in odium of the creditor, it is certain that, in either caſe, the natural obligation remains, as there is need of an exception. Therefore, the diſtinction of a natural and a civil debt is not ſufficient; as there are other diſtinctions, by which in many caſes a natural debt, after having been paid, may be reclaimed.

But from all this it follows, that what appeared to oppoſe the ſecond ſolution above given of the law, *Cum quis*, may eaſily be anſwered.

For we ſaid, 1ſt, that the term *indebitum* might be underſtood of what was due naturally, but not civilly, but that this ſolution or interpretation might appear doubtful, becauſe, in that caſe, the term *indebitum* would be uſed in the ſame law, in two ſenſes plainly different from each other, inaſmuch as it is decided in the ſecond part of the law, that that *indebitum* only can be reclaimed which is paid by an error of fact, and then it certainly ſeems that the term cannot be underſtood of what is naturally due; for the creditor cannot reclaim that, even though he made the payment under an error of fact, and that therefore the term in the firſt part of the law would be only referrible to what was only not due civilly, and in the ſecond part, it would be referrible alſo to what was not due naturally. But this concluſion appears to proceed wholly from a falſe principle; for it ſuppoſes that what is not due civilly, but is due naturally, can in no caſe be reclaimed, which we have already demonſtrated to be falſe in ſeveral caſes; but if this is once admitted, then the term in queſtion has, in the law *ſi quis*, one uniform ſignification. So that the ſenſe is, that what is naturally due cannot be reclaimed if it is paid by an error of law; otherwiſe, if it is paid by an error of fact, of which a diſtinguiſhed example occurs in the before mentioned law 9. *Cod. ad leg. Falcid.*

Therefore there is nothing to prevent the threefold ſolution of the law, *Cum quis*, which is above propoſed.

But I am inclined to think it ought to be admitted, chiefly for three reaſons, in addition to thoſe already alleged.

The firſt is deduced from the *Rubric* itſelf, under which the law *Cum quis* is placed, *viz.* under the title *de jur. & fact. ign.* in which there

there is no queſtion concerning the term *indebitum*; nor is it any object to expound the various interpretations of that word, or to define in what caſes the *condictio indebiti* ſhall or ſhall not take place. Moreover it is certain, beſides other things in which they differ, that there is this great diſtinction, that, ſpeaking generally and abſtractedly, an error of fact does not prejudice a claim of repetition, but an error of law does. Therefore the deciſion of the law, and the intention of the legiſlature are abundantly ſatisfied, when an interpretation is given to the law *cum quis*, which clearly and plainly admits a difference between an error of law and an error of fact, but leaves untouched a queſtion not touched upon by the law, to wit, the different kinds of caſes to which the term *indebitum* may be applied.

But another reaſon is much ſtronger. For it appears, from what has been already ſaid, that one or the other of the laws, that is either the law *cum quis*, or the laws 7 and 8. *ff. de jur. et fact. ign.* require interpretation and diſtinction.

For if the law *cum quis* is to be underſtood abſolutely, how can that ſtand which *Papinian* ſays in *L.* 7 & 8. *de jur. et fact. ign.* That error of law hurts no one in matters of loſs? Therefore in that caſe, the diſtinction between future and paſt loſs will be to be ſupplied in the anſwer of *Papinian*, according to the opinion of *Cujas*.

But if the words of *Papinian* in the ſaid laws, are to be underſtood ſimply and without diſtinction, the opinion of *Gordian* on the law *cum quis* will appear manifeſtly abſurd, unleſs you ſo temper it that it ſhall prevail in matters of ſtrict right, without being extended to what is due equitably and by the law of nature; or laſtly, that it may be conſidered as containing a general rule ſubject to ſeveral exceptions.

Therefore, ſince an interpretation and diſtinction muſt neceſſarily be made in the one law or the other, it remains to inquire which diſtinction appears to be the more juſt and equitable; that which reſts upon this ſingle foundation, that he who demands the repetition of his own is catching at an advantage, and that what almoſt every man would denominate a loſs, ſhould only be called ſo when it is future, and can ſtill be avoided; but that when it is paſt and can no longer be avoided, but can only be revoked and repaired, the reparation ſhould be conſidered as gain: whether that diſtinction ſhould be preferred which ſubverts ſeveral laws, and the very principles of equity itſelf, which ordains that one man ſhall, without cauſe, be enriched by the ruin of another; laſtly, which in a great meaſure abrogates and annihilates the title in the digeſt, and code, of *condictio ſine cauſa?*

Or

Or whether there ſhall be ſubſtituted in its room, that much more favourable diſtinction which is aided by natural reaſon, by equity, by all the laws, with one ſingle exception, that may be called rather ambiguous than contradictory; or laſtly, whether that diſtinction ſhall be admitted, which ſuppoſes nothing but what is generally notorious; to wit, that amongſt juriſts one thing prevails in reſpect of ſtrict law, and another in reſpect of equity and juſtice, that there are ſeveral kinds of *indebita*, and that ſo far as relates to error of law and of fact, it ought only to be conſidered, whether what was naturally due was paid by error of law or of fact, that in juriſprudence all definitions are dangerous; and that there is no rule ſo univerſal as not to admit of an exception, and if all theſe things are certain, manifeſt, known, and approved, it muſt be determined that a diſtinction which is comprized in theſe principles, is to be preferred to another diſtinction by which many things that are certain, muſt neceſſarily be ſubverted.

Let us add, that it is laid down as certain, by all juridical writers, that laws are to be favourably interpreted ſo as to anſwer their intention (*a*); that in caſe of ambiguity in the expreſſions of a law, that ſenſe is to be preferred which is free from injuſtice, eſpecially when by ſo doing the intention of the law can alſo be collected (*b*). In caſe of doubt to follow the more favourable conſtruction, is more juſt as well as more ſafe (*c*); all which conſiderations are both repugnant to the diſtinction of *Cujas*, and ſeem to afford a ſtriking confirmation of the oppoſite diſtinction.

Laſtly, a third reaſon which ſupports the three ſolutions already offered, may be deduced from the *Baſilican* interpreters, *ad Tit. de jur. & fact. ign.*

We have already mentioned, that there is not leſs diſcordance among them than among other interpreters, but it is a diſſenſion which can eaſily be reconciled, if we only diſtinguiſh between what is due naturally but not civilly, and what is not due either naturally or civilly.

That this may be better underſtood, we muſt refer to the obſervation already mentioned of the Greek interpreters, upon the words of *Papinian*, "*Juris error ſuum petentibus non nocet.*"

For inſtance, ſay they, a perſon ſtipulates for a ſlave to be given him, worth 20 guineas: the ſlave being dead, without there having been any delay, the promiſer ſuppoſes himſelf

(*a*) Benigniùs leges interpretandæ ſunt, quo voluntas earum conſervetur. L. 18. ff. de Legibus.

(*b*) In ambigua voce legis ea potius accipienda eſt ſignificatio, quæ vitio caret: præſertim cum etiam voluntas legis ex hoc colligi poſſit. L. 19. ibid.

(*c*) In re dubia benigniorem interpretationem ſequi, non minus juſtius eſt quam tutius. L. 3. de his quæ in teſtam. del.

to be bound by the action, *ex ſtipulatu*, and pays 20 guineas to the ſtipulator. He is aſſiſted, or, as it is in the Greek, he is conſidered with indulgence, (*ſubvenitur, aut, ut in Græco textu habetur, ignoſcitur ei*,) becauſe he contends with reference to the loſs of the amount, and he may reclaim what he has paid.

We have already demonſtrated that there is here a manifeſt error of law, both in the view of the interpreters, who intended to ſtate the caſe of a perſon miſtaking the law, and from the very nature of the fact itſelf, in which the debtor is ignorant of that ſolemn and well known maxim of juriſprudence, that the debtor of a ſpecific thing is liberated by its deſtruction.

Therefore in the judgment of the Greek interpreters, a perſon who has made a payment in conſequence of an error of law, is entitled to reclaim it.

But, it may be ſaid, that here and elſewhere the ſame interpreters declare, that perſons who from an ignorance of the law pay what is not due, are not entitled to repetition.

A great contradiction certainly, but one which will eaſily admit of a ſolution, that entirely overturns the diſtinction of *Cujas*, and eſtabliſhes the other which is oppoſed to it.

What then remains, but to reſort to the approved (*ſæpe laudatam*) diſtinction, and to confeſs that an error in law does not prejudice a perſon who has made the payment, not being under any obligation either civil or natural; that on the contrary, if he were bound by natural law, and paid under error of the civil law, the right of repetition is properly denied; ſo that it ſhall be a certain and conſtant rule, that a perſon under a natural obligation ſhall only be intitled to repetition, if he pay the money which is not civilly due under an error of fact.

There are two advantages in this diſtinction:

1ſt. It eaſily reconciles the difference among the Greek interpreters: for, in the firſt obſervation, the queſtion relates to one who by the death of the ſlave was liberated, from all obligation both natural and civil; in which caſe the error of law ſhall not hurt, nor the right of repetition be denied; in the ſecond obſervation, it relates to thoſe who, have paid, being naturally indebted, but ignorant of the civil law, by which they might protect themſelves, and who are therefore properly ſaid to contend for gain, as no perſon is underſtood to ſuſtain a loſs in diſcharging a natural obligation.

2d. This diſtinction not only removes every contradiction, but is the only one that can do ſo; nor is it probable only, but neceſſary. Whence it is juſtly to be concluded, that the *Baſilica* interpreters are ſupported by it, and mutually ſupport it in their turn;

turn; for as this diſtinction explains their writings it is alſo proved by them; for that diſtinction cannot appear falſe, without which there would be a perpetual diſſention, among thoſe who cannot for a moment be ſuppoſed to have held different and ſtill leſs oppoſite opinions.

Finally, that we may reduce the chief of the heads of this diſcuſſion within certain limits, by a ſhort recapitulation, it ſeems requiſite throughout the whole of the queſtion to admit the following diſtinctions.

A perſon ignorantly paying what is not due, miſtakes either the fact or the law.

If he miſtake the fact, it ſeems that he is without diſtinction entitled to repetition, even though he were under a natural obligation; ſince error of fact is not prejudicial, even to men, either in reſpect of loſs or gain. *L.* 8. *ff. de jur. et fact. ign.*

But if he erred in point of law, the queſtion relates either to gain or loſs.

If it relate to gain, it is agreed that an error of law can never confer an advantage. *L.* 7. *ff. de jur. et fact. ign.*

If to loſs, then without any diſtinction between paſt loſs and future, it ſeems that it ought to be held, that error in law ſhall not induce a prejudice. But that it may be more eaſily underſtood, what ſhall be ſignified by the name of loſs, the following diſtinction is to be applied:

The perſon who paid was only under a natural obligation, and then his claim founded on an error of law is not allowed. For a perſon is rather contending for gain, who ſeeks the repetition of what he has paid in diſcharge of a natural obligation. But it may be alleged that aſſiſtance is given to a perſon paying under a miſtake of law, by the authority of the *L.* 40. *ff. de condict. indeb.* according to which a perſon who has a perpetual exception, is entitled to repetition provided the exception is favourable, and introduced for the benefit of the debtor, and not in odium of the creditor; ſuch as the exception of the *Senatus-conſultum Velleianum*; but in that caſe, the woman ſeems naturally indebted, unleſs you prefer ſaying with *Cujas*, that the authority of the law is ſuch, as to deſtroy not only the civil but the natural obligation; which, however, is very difficult to underſtand. Perhaps it would be ſafer, notwithſtanding we have above thought otherwiſe, to interpret the law as only applying to error of fact. Yet the law ſeems rather to import the contrary. But an old interpreter thinks it a ſpecial rule, and confined to women, that they may reclaim what they have

paid ſolely under an error in law, although it were due by the ties of natural obligation.

Or the debt was only civilly and not naturally due, as in caſe of a perſon condemned by an invalid judgment, againſt which there was a right of appeal; but the party, ſuppoſing the judgment to be valid, pays the money; and then, as what is adjudged is to be taken as true, I can readily ſuppoſe there to be no right of repetition; but this muſt be more attentively conſidered. *V. L.* 29. § 5. *ff. Mandat* (*a*).

Or the money was due both naturally and civilly, but the party was entitled to a perpetual exception, and being ignorant of that circumſtance paid the amount; and as it was held that the perſon who was only naturally indebted is not entitled to repetition, much more is the perſon who was indebted by both laws diſabled from reclaiming what has been paid; unleſs indeed the exception is ſuch as to deſtroy the natural obligation.

Or what was paid was not due by either law, and then what was paid, although by error of law, may, as it has been already proved, be reclaimed, unleſs, which is laſtly to be added, it was paid from a principle of piety; for then the falſe opinion being out of the queſtion, the conſideration of piety remains, a payment founded upon which is not ſubject to repetition. *L.* 32. § 2. *ff. de cond. indeb.* (*b*). For here, the conſideration of piety amounts to, and ſupplies the place of natural obligation; and ſo long as any the ſmalleſt cauſe of obligation continues, the right of repetition, as we have frequently obſerved, is properly withheld.

(*a*) Vide ante, 426, 427.

(*b*) Mulier, ſi in ea opinione ſit ut credat ſe pro dote obligatam, quicquid dotis nomine dederit, non repetet: ſublata enim falſa opinione, relinquitur pietatis cauſa, ex qua ſolutum repeti non poteſt.

CHAP.

CHAPTER XLVII. OF BOOK I.

OF THE SELECT QUESTIONS OF VINNIUS.

Whether what is paid, without being due by an Error of Law, is subject to Repetition.

THE queſtion is how to expound what is laid down ſimply, and generally, that what is paid by miſtake, without being due, may be reclaimed; whether it is confined to error of fact, or extends alſo to error of law. For error is twofold, being either of fact or law. An error of fact takes place, either when ſome fact which really exiſts is unknown, or ſome fact is ſuppoſed to exiſt which really does not. On the other hand, when a perſon is truly acquainted with the exiſtence or non-exiſtence of the facts, but is ignorant of the legal conſequences, he is under an error of law. *L.* 1. *ff. de jur. et fact. ign.* (*a*). If a perſon makes a payment knowing that he is not indebted, it is agreed on all hands that he has not any right of repetition. *L.* 1. § 1. (*b*). *L.* . *ſi non ſortem* 26. § *indebitum* 3. (*c*). *de cond. indeb.* for a payment which is ſubject to repetition, if made by miſtake, amounts to a donation, if made with full knowledge. *L. Cujus*, 53. *ff. de reg. jur.* (*d*). And on the other hand it is a clear rule of law, that a perſon is intitled to repetition who pays what he does not owe, believing through a miſtake of fact that he does. *L.* 6. (*e*) *L.* 7. *C. de cond. indeb.* (*f*). *L. Error*, 7. *C. de juris et facti ignorantia.* (*g*). The

(*a*) Ignorantia vel facti vel juris eſt, § 1. Nam ſi quis neſciat deceſſiſſe eum, cujus bonorum poſſeſſio defertur, non cedit ei tempus. Sed ſi ſciat quidem defunctum eſſe cognatum, neſciat autem proximitatis nomine bonorum poſſeſſionem ſibi deferri; aut ſe ſciat ſcriptum heredem, neſciat autem quod ſcriptis heredibus bonorum poſſeſſionem prætor promittit, cedit ei tempus, quia in jure errat. Idem eſt ſi frater conſanguineus defuncti credat matrem potiorem eſſe.

(*b*) Et quidem, ſi quis indebitum ignorans ſolvit, per hanc actionem condicere poteſt: ſed ſi ſciens ſe non debere ſolvit, ceſſat repetitio.

(*c*) Indebitum autem ſolutum accipimus non ſolum ſi omnino non debeatur, ſed et ſi per aliquam exceptionem perpetuam peti non poterat; quare hoc quoque repeti poterit; niſi ſciens ſe tutum exceptione, ſolvit.

(*d*) Cujus per errorem dati repetitio eſt, ejus conſulto dati donatio eſt.

(*e*) Si per ignorantiam facti non debitam quantitatem pro alio ſolviſti, et hoc adito recto re provinciæ fuerit probatum, hanc ei; cujus nomine ſoluta eſt, reſtituti eo agente providebit.

(*f*) Fidei commiſſum vel legatum indebitum per errorem facti ſolutum, repeti poſſe explorati juris eſt.

(*g*) Error facti, nondum finito negotio, nemini nocet: nam cauſa deciſa velamento tali non indiget.

only queſtion is, whether a perſon is intitled to *condiction* or repetition, who has paid what he did not owe, being miſled by an error of law. Moſt of the later writers are in favour of the negative. *Cuj.* 5. *obſ.* 39. *Duar. ad tit. de cond. indeb.* c. 7. *Donell.* 1 *comm.* 21. *Brencborſt,* 2 *aſſ.* 36. *Perez* in *cod. de cond. indeb.* 12. The ancient interpreters take the affirmative ſide of the queſtion, and are followed by *Zas. ad rubr. de cond. indeb. n.* 5. *Sichard, ad rubr. et L. cod. eod. Weſenb. par eod. n.* 9. *Thulden, L. eod. n.* 4. *Grotius, lib.* 3. *introd. ad juriſp. Batav.* c. 30. *Chriſtin.* Vol. 3. *deciſ.* 8. *Bachov. diſput.* 4. *de act. theſ.* 17. But before we open our own opinion, ſince the queſtion relates to a payment of what is undue, (*indebitum,*) it will be worth while to examine what juridical writers means by that term. And no body doubts that, that is to be conſidered as undue, which is not due either civilly or naturally. But ſuppoſe a debt is due civilly but not naturally, or *e converſo?* If it is only due civilly, that is, if it is due by an obligation, which produces no equitable claim; ſo that *ſummo jure,* it is ſubject to a right of action, but may be repelled by a perpetual exception, it is conſidered as really undue, and if it is paid by miſtake may as ſuch be reclaimed. *L. ſi non ſortem,* 26. § 3. (*a*). *L. qui exceptionem,* 40. (*b*). *L. ſi quis,* 43. (*c*). *L. ex his omnibus,* 54. (*d*). *ff. de cond. indeb.* For ſuch a demand is only nominally, and not really due; not being due by the law of nature, nor in effect by the civil law. *L.* 3. §. 1. *ff. de pecun. conſtit.* (*e*). *L. nihil intereſt.* 112. *ff. de reg. jur.* (*f*). But what is naturally due, although *ſummo jure* it is not civilly ſo, is in this reſpect conſidered as a real debt, and therefore although it cannot be recovered, when it is actually paid, even under a belief that it might have been ſo, it cannot be reclaimed; as appears by ſeveral authorities. *L. naturales,* 10. *ff. de obl. et act.* (*g*). *L. indebiti.* 15. (*b*). *L. ſi pœnæ* 19. (*i*). *L. ſi non ſortem.* 26. § *libertus.* 12. (*k*) *L. Julio*

(*a*) Vide ante, p. 437.

(*b*) Vide ante, 416.

(*c*) Si quis juraſſet *ſe dare non oportere,* ab omni contentione diſcedetur: atque ita ſolutam pecuniam repeti non poſſe.

(*d*) Vide ante, 411.

(*e*) Si quis autem conſtituerit, quod jure civili debebat, jure prætorio non debebat, id eſt, per exceptionem: an conſtituendo teneatur, quærimus? Et eſt verum ut [&] Pomponius ſcribit, eum non teneri: quia *debita juribus* non eſt pecunia, quæ conſtituta eſt.

(*f*) Nihil intereſt, ipſo jure quis actionem non habeat, an per exceptionem infirmetur.

(*g*) Naturales obligationes non eo ſolo æſtimantur, ſi actio aliqua earum nomine competit: verumetiam eo, ſi ſoluta pecunia repeti non poteſt.

(*h*) Indebiti ſoluti condictio naturalis eſt. Et ideo ei quod rei ſolutæ acceſſit, venit in condictionem: ut puta partus qui ex ancilla; vel quod alluvione acceſſit; imo et fructus quos is, cui ſolutum eſt, bona fide percepit, in condictionem venient.

(*i*) Libertus cum ſe putaret operas patrono debere ſolvit, condicere eum non poſſe, quamvis putans ſe obligatum. Julianus ſcripſit, natura enim operas patrono debuit.

(*k*) Si pœnæ cauſa ejus, cui debetur, debitor liberatus eſt, naturalis obligatio manet; et ideo ſolutum repeti non poteſt.

mus,

nus, 60. (*a*). *ff. de cond. indeb. L.* 3. § *ult. ff. quod quiſq. jur.* (*b*). And ſince that which is naturally due, may be made the ſubject of compenſation, it is highly reaſonable that no repetition of it ſhall be allowed when it is paid by miſtake. But even where the debtor has a perpetual exception, if it is for a cauſe which does not deſtroy the natural obligation, ſtill there is no right to reclaim what has been paid by miſtake. Such is the *exceptio rei judicatæ*; the ſentence of the judge cannot deſtroy the natural obligation, ariſing from the conſent of the party; and therefore, *Julianus* and *Paulus* have decided that a real debtor who has paid the debt, after having been diſcharged by a judgment, has no right of repetition. *d. l. Julianus*, 60. *de cond. indeb.* To the ſame principle, many refer the exception of the *Senatus-conſultum Macedonianum*. For if a ſon, while under the dominion of his father, borrows money, and pays it after he becomes his own maſter, he has no right of repetition, as he is under a natural obligation. *L.* 9. *in fin. et L. ſeq.* (*c*). *ff. de ſenatuſc. Mac.* Another reaſon for denying the repetition, is aſſigned in *qui exceptionem*, 40. *ff. de cond. indeb.* (*d*). but that does not always apply, as appears by the before mentioned law of *Julianus*. And in this caſe, I think a diſtinction ſhould always be made, between an error of law and of fact. *L. ult. ff. de ſenatuſc. Mac.* (*e*). And therefore, here the term *debitum* may be applied to what is due only naturally, and *indebitum* to what is only due by the ſtrictneſs of civil law. We here apply the expreſſion of a natural debt, according to its ancient ſignification, as having all the effects as well of a civil as of a natural obligation; the right of action only excepted (*f*). But if even the natural obligation is expreſsly diſapproved by the civil law, as in the caſe of a woman engaging as ſurety, *L. ſi mulier*, 16. § 1. (*g*). *ad ſen.*

(*a*) Julianus verum debitorem poſt litem conteſtatam, manente adhuc judicio, negabat ſolventem repetere poſſe: quia nec abſolutus, nec condemnatus repetere poſſet. Licet enim abſolutus ſit, natura tamen debitor permanet, ſimilemque eſſe ei dicit qui ita promiſit *ſive navis ex Aſia venerit ſive non venerit*: quia ex una cauſa alterius ſolutionis origo proficiſcitur.

(*b*) Ex hac cauſa ſolutum repeti non poſſe. Julianus putat: ſupereſſe enim naturalem cauſam, quæ inhibet repetitionem.

(*c*) Et hi tamen, qui pro filio familias ſine voluntate patris ejus interceſſerunt non repetent; atquin perpetua exceptione tuti ſunt. Sed et ipſe filius et tamen non repetit: quia hi demum ſolutum non repetunt, qui ob pœnam creditorum actione liberantur, non quoniam exonerare eos lex voluit. Quanquam autem ſolvendo non repetunt. L. 9. Quia naturalis obligatio manet. L. 10.

(*d*) Vide ante, 416.

(*e*) Si is, cui dum in poteſtate patris eſſet, mutua pecunia data fuerat, paterfamilias factus, per ignorantiam facti, novatione facta eam pecuniam expromiſit, ſi petatur ex ea ſtipulatione, in factum excipiendum erit.

(*f*) See the preceding Treatiſe, P. II. C. II. p. 108.

(*g*) Si ab ea muliere quæ contra ſenatus conſultum interceſſiſſet, fidejuſſorem accepiſ-

ſen. Vell. of a prodigal making any promiſe, *L. 6. ff. de verb. obl.* (*a*). or is deſtitute of the aſſiſtance of the civil law, in other reſpects as well as the right of action, although it may admit of acceſſions, as the obligation of a pupil, contracted without the authority of his tutor, repetition is without any natural reaſon allowed, in the ſame manner, as if what is paid was not even naturally due, *L. qui exceptionem*, 40. (*b*). *L. ſeq.* (*c*). *de cond. indeb. L. 9. Cod. ad ſen. Vel.* (*d*) *d. l. 6. ff. de verb. obl.* Of the ſame kind is the natural obligation, induced by the will of a teſtator, not accompanied by the requiſite ſolemnities, or giving a larger portion of his property than the law allows by way of legacy; although this has the effect of a natural obligation with reſpect to error of law. *L. 9. C. ad leg. Falcid.* (*e*). *L. 7. C. de cond. indeb.* (*f*).

With reſpect to the queſtion propoſed, I ſubſcribe to the opinion of the old interpreters, that repetition ſhould be allowed even of what is paid by error of law, provided there is not any natural obligation. In the firſt place, I am influenced by the conſideration, that the *condictio indebiti* is introduced *ex æquo et bono, L. pen. ff. de cond. indeb.* (*g*). and therefore can only be excluded by exceptions founded upon equity on the oppoſite ſide. But what equity can a perſon pretend to, to whom any thing has been paid, which was not even naturally due, whether becauſe the cauſe of the ſuppoſed debt was invalid *ab initio*, or becauſe it had not effect, as in the caſe of a mere civil debt, or what colour has he for excepting to a claim of repetition? For as ſuch a debt has not any of the effects of a real debt, it is not allowed in compenſation. *L. 14. ff. de compenſ.* (*h*). it does not admit of acceſſions, *L. 3.*

ſem; Gaius Caſſius reſpondit, ita demum fidejuſſori exceptionem dandam, ſi a muliere rogatus fuiſſet. Julianus autem recte putat, fidejuſſori exceptionem dandam, etiamſi mandati actionem adverſus mulierem non habet; quia totam obligationem ſenatus improbat, et a prætore reſtituitur prior debitor creditori.

(*a*) Is cui bonis interdictum eſt, ſtipulando ſibi adquirit, tradere vero non poteſt, vel promittendo obligari, et ideo nec fidejuſſori pro eo intercedere poterit, ſicut nec pro furioſo.

(*b*) Vide ante, 416.

(*c*) Quod pupillus ſine tutoris auctoritate ſtipulanti promiſerit, ſolverit, repetitio eſt; quia nec natura debet.

(*d*) Quamvis mulier pro alio ſolvere poſſit, ſi præcedente obligatione quam ſenatus conſultum de interceſſionibus efficacem eſſe non finit, ſolutionem fecerit, ejus ſenatus conſulti beneficio munitam ſe ignorans, locum habet repetitio.

(*e*) Error facti, quartæ ex cauſa fideicommiſſæ non retentæ repetitionem non impedit. Is autem qui ſciens ſe poſſe retinere [univerſum reſtituit] condictionem non habet: Quinetiam jus ignoraverit ceſſa repetitio.

(*f*) Vide ante, 437.

(*g*) Hæc condictio ex bono et æquo introducta quod alterius apud alterum ſine cauſa reprehenditur, revocare conſuevit.

(*h*) Quæcunque per exceptionem perimi poſſunt, in compenſationem non veniunt.

§ 1;

§ 1. *ff. de pecun. conſtit.* (*a*). *L.* 7. *ff. de fidej.* (*b*). the prætor, if the fact is clear, does not allow an action for it; in a doubtful caſe he only allows it ſubject to the exception, *L. nam, poſtquam. q. ff. de jurej.* (*c*). by which he ſhews that it is not conſidered as a debt, and who can ſuppoſe, that if it is paid by miſtake, it is not ſubject to repetition? For it is a firſt rule of equity, that one man ought not to be enriched by the detriment of another. *L. nam hoc* 14. *de cond. indeb.* (*d*). Therefore if any perſon ſhould obtain a promiſe from another by fraud, I cannot think that what is paid on account of ſuch a promiſe, although by error of law, can be retained, and that a man ſhall be allowed to take advantage of his own iniquity, upon the mere pretext that the money was paid by the other party, under an ignorance that he would have been protected by an exception of fraud or fear. And that we may not appear to ſpeak without authority, the text of *L.* 7. *ff. de cond. ob turp. cauſam.* (*e*), where *Pomponius* ſays, that, if money is exacted on account of a ſtipulation extorted by force, it is a caſe for repetition, is evidently deciſive upon that ſubject. And *Julianus* anſwers after *Nerva* and *Atilicinus*, that money paid by a perſon who ſuppoſed himſelf to owe it, when he could have been protected by an exception of fraud, may be reclaimed. *L. qui ſe debere.* 7. *ff. de condic. cauſa data.* (*f*) There are ſimilar paſſages in *L. cum. is* 32. § 1. (*g*) *L. ſi quis* 43. (*h*) *L. ſi fidej.* 59. *ff. de cond. indeb.* (*i*) *L.* 5. *cod.*

(*a*) Vide ante, 438.

(*b*) Quod enim ſolutum repeti non poteſt, conveniens eſt hujus naturalis obligationis fidejuſſorem accipi poſſe.

(*c*) Nam poſtquam juratum eſt, denegatur actio: aut ſi controverſio erit, id eſt, ſi ambigitur, an jusjurandum datum ſit, exceptioni locus eſt.

(*d*) Vide ante, 410.

(*e*) Ex ea ſtipulatione, quæ per vim extorta eſſet, ſi exacta eſſet pecunia, repetitionem eſſe conſtat.

(*f*) Qui ſi debere pecuniam mulieri putabat, juſſu ejus, dotis nomine promiſit ſponſo, et ſolvit; nuptiæ deinde non interceſſerunt: quæſitum eſt, utrum ipſe poteſt repetere, [eam] pecuniam, qui dediſſet, an mulier? Nerva et Atilicinus reſponderunt, quoniam putaſſet quidem debere pecuniam, ſed exceptione doli mali tueri ſe potuiſſet, ipſum repetiturum, ſed ſi eum ſciret ſe nihil mulieri debere promiſit, mulieris eſſe actionem, quoniam pecunia ad eam pertineret; ſi autem vere debitor fuiſſet, et ante nuptias ſolviſſet, et nuptiæ ſecutæ non fuiſſent, ipſe poſſit condicere, cauſa debiti integra muliere ad hoc ſolum manente, ut ad nihil aliud debitor compellatur, niſi ut cedat ei condictitia actione.

(*g*) Fidejuſſor, cum paciſſitur, ne ab eo pecunia petatur, et per imprudentiam ſolverit condicere ſtipulatori poterit: et ideo reus quidem manet obligatus, ipſe autem ſua exceptione tutus eſt; nihil enim intereſt fidejuſſor an heres ejus ſolvat. Quod ſi huic fidejuſſori reus heres extiterit et ſolverit, nec repetet et liberabitur.

(*h*) Si quis juraſſet *ſe dare non oportere*, ab omni contentione diſcedituc: atque ita ſolutam pecuniam repeti poſſe deiendum eſt.

(*i*) Si fidejuſſor jure liberatus, ſolverit errore pecuniam, repetenti non oberit; ſi vero reus promittendi per errorem, et ipſe poſtea pecuniam ſolverit, non repetet, cum prior ſolutio,

cod. eod. (*a*). And it is evident that in theſe paſſages, the queſtion is reſpecting error of law, as they relate to the acts of the party himſelf, and no perſon can be ignorant of his own acts without the groſſeſt negligence, and an ignorance of that kind is ſimilar to an ignorance of law. *L.* 9. § 2. *ff. de jur. et fact. ign.* (*b*). for no perſon can pretend to be ignorant of his own acts. *L.* 7. *ff. ad ſenat. Vell.* (*c*). *adde L. mandatum*, 57. *ff. mandat.* (*d*). *L.* 1. *pr. ff. ut in poſſ. leg.* (*e*). I am alſo influenced by the conſideration that in the whole title of the *Pandects, de condic. indeb.* although it is rather diffuſe, the right of repetition is never applied ſolely to error of fact, or denied to error of law, but is referred generally to error, whether what is paid was not due in any ſenſe, or whether the claim of it could be repelled by a perpetual exception; ſo that it is to be underſtood that the right of repetition is not prevented by the nature of the error, but by the knowledge of the perſon making the payment and by that only, as is clearly proved as well by the laws 1. § 1. (*f*). *ſi non ſortem* 26. § 1. *ff. eod.* (*g*). as by the reaſon which is aſſigned, why a perſon cannot reclaim

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ſolutio, quæ fuit irrita, naturale vinculum non diſſolvit, nec civile, ſi reus promittendi tenebatur.

(*a*) Si a patre emancipatus, ei non intra tempora præſtituta jure honorario ſucceſſiſti quidquid indebitum poſtea per errorem (utpote patris ſucceſſori) dediſti ejus condictionem, tibi competere non eſt incerti juris.

(*b*) Sed facti ignorantia ita demum cuique non nocet, ſi non ei ſumma negligentia objiciatur; quid enim ſi omnes in civitate ſciant, quod ille ſolus ignorat? Et recte Labeo definit ſcientiam neque curioſiſſimi neque negligentiſſimi hominis accipiendam; verum ejus qui eam rem diligenter inquirendo notam habere poſſit.

(*c*) Quanquam igitur fidejuſſor, doli replicatione poſita, defenſionem exceptionis amittat, nullam tamen replicationem adverſus mulcteam habebit: quia facti non poteſt ignorantiam prætendere. Sed non erit iniquum, dari negotiorum actionem in defenſorem; quia mandati cauſa per Senatus-conſultum conſtituitur irrita, et pecunia fidejuſſoris liberatur.

(*d*) Mandatum diſtrahendorum ſervorum, defuncto, qui mandatum ſuſcepit, intercidiſſe conſtitit; quoniam tamen heredes ejus errore lapſi, non animo furandi ſed exſequendi, quod defunctus ſuæ fecerat, ſervos vendiderant, eos ab emptoribus uſucaptos videri placuit: ſed vendiciarum ex provincia reverſum, Publiciana actione non utiliter acturum, cum exceptio juſti dominii cauſa cognita detur, neque opporteat eum, qui certi hominis fidem elegit, ob errorem aut imperitiam heredum, adhuc damno.

(*e*) Si quis, cum vetitus eſſet ſatis accipere, acciperit an repeti ſatisdatio iſta poſſit, ut heres condicat liberationem? Et quidem [ſi] ſciens heres indebitum cavit, repetere non poſſit, quid deinde ſi ignoravit remiſſam ſibi ſatisdationem poteſt condicere. Si vero hoc non potuiſſe remitti crediderit, nunquid condicere poſſit, qui jus ignoravit; adhuc tamen benigne quis dixerit ſatisdationem condici poſſe. Quid deinde, ſi commiſſa ſit ſtipulatio? Fidejuſſores putamus exceptione uti poſſe, an non; et magis eſt, [ut] utantur exceptione: quia ex ea cauſa interceſſit ſatisdatio, ex quâ non debuit.

(*f*) Et quidem ſi quis indebitum ignorans ſolvit, per hanc actionem condicere poteſt: ſed ſi ſciens ſe non debere ſolvit, ceſſat repetitio.

(*g*) Supra duplum autem uſuræ et uſurarum uſuræ, nec in ſtipulationem deduci nec exigi poſſunt: et ſolutæ repetuntur, quemadmodum futurarum uſurarum uſuræ.

what he has paid knowing it not to be due from him, viz. that he is preſumed to have given it. *L.* 53. *ff. de reg. jur.* (*a*) *L.* 7. *cod. de cond. ob cauſ. dat.* which certainly cannot be ſaid of a perſon who thought himſelf under the obligation, and neceſſity of paying. *L.* 1. *pr. ff. ut in poſſ. leg.* (*b*) the reſciſſion of a ſecurity is allowed, in caſe it was given by one who was ignorant of the law, but denied, if it was given knowingly. In the laſt place, I am chiefly influenced by the ſentiment of *Papinian*, in *L.* 8. *ff. de jur. et fact. ign.* (*c*). that ignorance of law is not injurious to any one in reſpect to loſing what belongs to him, (AMITTENDÆ *rei ſuæ*). This appears to me plainly to indicate, that what is paid even by an error of law, without being due, may be reclaimed; for if we deny this, we muſt neceſſarily acknowledge, that an error of law does ſubject a man to the loſs of what belongs to him, in oppoſition to the judgment of *Papinian*. Neither do I ſee how any anſwer can be given to this argument without a cavil: for certainly the anſwer which is given in ſupport of the modern opinion, viz. that the perſon making the claim does not contend *de re* AMITTENDA, but *de re* AMISSA, is nothing more; for if a man, by paying through a miſtake of law what is not due from him, ſo loſes his property as to have no recovery, then his miſtake has the effect of injuring him *in damno amittendæ rei ſuæ*. And the queſtion relates not to the time of inſtituting the action, but to that of making the payment, and *Papinian* denies that a perſon miſtaking the law thereby loſes his property, that is, ſo that he can never recover it. And it is almoſt (*tantum non*,) ridiculous to ſay, that a perſon would derive a gain from his error of law, merely by recovering his own property back again, for that having been transferred to another, it would be a new acquiſition. As if a man did not ſuffer any loſs in the deprivation of his property, (*quaſi damno non afficiatur, qui dominium rei ſuæ amittit*,) or the reparation of a loſs was to be regarded as a gain. Nothing can be ſaid to be a gain, except after deducting the loſs; and the action in queſtion is only for recovering the amount of the loſs that has been ſuſtained. And the declaration of *Papinian* in *L.* 7. *ff. de jur. et fact. ign.* (*d*). that ignorance of the law, is of no detriment to perſons ſeeking their own, is referable to all who only endeavour to avoid a loſs. Neither is the *L. ſi fidejuſſor.* 39. § 1. *ff. mand.* (*e*). at all at variance with this deciſion, for there the caſe is propoſed of two perſons, each contending for the avoidance of a loſs; a debtor who was intitled to a perpetual exception, and a ſurety, who, with a knowledge of the facts, diſcharged the amount of the debt; and it is ruled that in this caſe the

(*a*) Vide ante, 437. (*b*) Vide ante, 442. (*c*) Vide ante, 412.
(*d*) Vide ante, 412. (*e*) Vide ante, 423.

ſurety

ſurety has not any action *mandati* againſt the debtor, but nothing is ſaid with reſpect to his right of repetition againſt the creditor. The ſame paſſages clearly ſhew the error of thoſe who maintain that there is no difference between a knowledge and an ignorance of the law. Suppoſe the perſon who receives the money miſtakes the law, ſhall he be charged with theft (*a*)? Or if he knows that the money is not due to him and yet pretends that it is, ſhall he be free from that imputation, on the ground that the other party who miſtakes the law, is to be regarded as having acted knowingly, and as having made a donation. *Vid. L. Quoniam*, 18. *ff. de cond. furtiv.* (*b*) *L. falſus*, 43. *pr. ff. de furt.* (*c*) What then is the concluſion? An error of the law is of no avail to thoſe who are deſirous of making an acquiſition. *d. L.* 7. *ff. de jur. et fact. ign.* of which there are examples, in *L.* 4. *ff. eod.* (*d*). *L.* 10. *ff. de bonor. poſſ.* (*e*). *L. nunquam*, 31. *ff. de uſucap.* (*f*) *L.* 11. *cod. de jur. et fact. ign.* (*g*). but it is no detriment to thoſe who only ſeek their own property, and contend againſt the injury of loſing it. *d. L.* 7. *et d. L.* 8. And what is ſaid in law 9. *ff. eod.* (*h*). that ignorance of the law is injurious, is to be underſtood as meaning that it ſhall not afford any advantage, that ſhall not be attended with any gain; but not that it ſhall be actually productive of loſs. For it muſt be remembered that error of law, as was before obſerved, only prevents a party from being deprived of the right of repetition, provided there is not any natural obligation. But if the payment was founded upon ſuch a debt, as would give a juſt ground of retention to the perſon who received it, the diſtinction is to be made between error of law and error of fact; and a repetition is to be allowed in the latter caſe, but not in the former.

(*a*) The term theft, (furtum) has a much more extenſive application in the *Roman* than in the *Engliſh* law.

(*b*) Quoniam furtum fit, cum quis indebitos nummos ſciens acceperit, videndum ſi procurator ſuos nummos ſolvat, an ipſi furtum fiat? Et Pomponius Epiſtolarum, lib. 8. ipſum condicere ait ex cauſa furtiva: ſed et me condicere, ſi ratum habeam, quod indebitum datum ſit; ſed altera condictione altera tollitur.

(*c*) Falſus Creditor (hoc eſt is, qui ſe ſimulat creditorem,) ſi quid acceperit, furtum fecit, nec nummi ejus fiunt.

(*d*) Juris ignorantiam in uſucaptione negatur prodeſſe; facti vero ignorantiam prodeſſe conſtat.

(*e*) In bonorum poſſeſſionibus juris ignorantia non prodeſt, quo minus dies cedat, et ideo heredi inſtituto, et ante apertas tabulas dies cedit: ſatis eſt enim, ſcire mortuum eſſe, ſeque proximum cognatum fuiſſe, copiamque eorum, quos conſuleret, habuiſſe; ſcientiam enim non (hunc) accipi, quæ juriſprudentibus ſit; ſed eam quam quis aut per ſe habeat, aut conſulendo prudentiores adſequi poteſt.

(*f*) Vide. ante, 413.

(*g*) Quamvis in lucro nec fœminis jus ignorantibus ſubveniri ſoleat; attamen contra ætatem imperfectam locum hoc non habere retro Principum ſtatuta declarant.

(*h*) Regula eſt *juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.*

Therefore

Therefore if I have borrowed money whilſt under the authority of my father, and paid it after becoming my own maſter, I am not intitled to repetition if I only miſtake the law, but it is otherwiſe if I miſtake the fact. *Arg. L. qui exceptionem*, 40. *de cond. indeb.* (*a*). *L.* 9. *in fin. cum L. ſequent. juſt. L. ultim. de ſenatus conſ. Macædon* (*b*). I diſcharge a truſt impoſed by the will of a teſtator, which is defective for want of the proper number of witneſſes (*c*). § *ult. inſt. de fideicom. hered.* (*d*). I pay the whole of a legacy without retaining a fourth to which I am intitled by the *lex Falcidia*. I am intitled to repetition in caſe of error in fact, but not of error in law. *L.* 2. *cod. ſi adv. ſolut.* (*e*). *L.* 7. *cod. de cond. indeb.* (*f*). *L.* 9. *C. ad leg. Falcid.* (*g*). not merely becauſe I am bound by my error of law, but becauſe the natural obligation ariſing from the will of the teſtator, gives a juſt cauſe of retention. *Arg. L.* 2. *C. de fideicom.* (*h*). *L. in teſtamento*, 38. *de fidei libertat.* (*i*). *L.* 5. § *ſi quis*, 15. *ff. de don. inter ux. et vir.* (*k*) And I think the ſame ſentiment is intended to be conveyed by *Grotius, lib.* 3. *introd. ad*

(*a*) Vide ante, 416.

(*b*) Hi qui pro filio familias ſine voluntate patris ejus interceſſerunt ſolvendo non repetent. Hoc enim et Divus Hadrianus conſtituit et poteſt dici non repetituros. Atquin perpetua exceptione tuti ſunt, ſed et ipſe filius et tamen non repetit: quia hi demum ſolutum non repetunt, qui ob pœnam creditorum actione liberantur, non quoniam exonerare eos lex voluit § 5. Quanquam autem ſolvendo non repetant l. 9. Quia naturalis obligatio, l. 10.

(*c*) Si is, cui, dum in patris poteſtate eſſet, mutua pecunia data fuerat, pater familias factus, per ignorantiam facti, novatione facta, eam pecuniam expromis et ſi petatur ex ea ſtipulatione, in furtum excipiendum erit.

(*d*) This ſection has not any relation to the right of repetition.

(*e*) Indebito legato licet per errorem juris a minore ſoluto repetitionem ei decerni; ſi necdum tempus, quo reſtitutionis tribuitur auxilium, exceſſerit, rationis eſt.

(*f*) Vide. ante, 437.

(*g*) Vide ante, 440.

(*h*) Et ſi inutiliter fideicommiſſum relictum ſit, tamen ſi heredes comperta voluntate defuncti, prædia ex cauſa fideicommiſſi avo tuo præſtiterunt; fruſtra ab heredibus ejus de ea re quæſtio tibi movetur, cum non ex ea ſola ſcripturâ, ſed ex conſcientia relicti fideicommiſſi defuncti voluntati ſatisfactum eſſe videatur.

(*i*) In teſtamento quod perfectum non erat, alumnæ ſuæ libertatem et fideicommiſſa dedit, cum omnia ut ab inteſtato egiſſent, quæſit imperator an [ut] ex cauſa fideicommiſſi manumiſſa fuiſſet? Et interlocutus eſt. *Etiam ſi nihil ab inteſtato pater petiſſet, prius tamen filios manumittere eam quam pater dilexiſſet*; pronunciavit igitur, *recte eam manumiſſam et ideo fideicommiſſa etiam ei præſtanda.*

(*k*) Si quis rogatus ſit, *præcepta certa quantitate, uxori ſuæ hereditatem reſtituere*, et is ſine deductione reſtituerit, Celſus, lib. 10. Digeſtorum ſcripſit, magis pleniore officio fidei præſtandæ functum maritum, quam donaſſet, videri. Et rectam rationem huic ſententiæ Celſus adjecit, quod plerique magis fidem exſolvunt in hunc caſum, quam donant; nec de ſuo putant proficiſci quod de alieno plenius reſtituunt, voluntatem defuncti ſecuti, nec immerito ſæpe credimus aliquid defunctum voluiſſe et tamen non rogaſſe. Quæ ſententia habet rationem magis in eo, qui non erat deducta quarta rogatus reſtituere, et tamen integram fidem præſtitit, omiſſo ſenatus conſulti commodo: hic enim vere fidem exſolvit, voluntatem teſtatoris obſecutus. Hoc ita, ſi non per errorem calculi fecit, cæterum indebiti fideicommiſſi eſſe repetitionem nulla dubitatio eſt.

juriſp.

juriſpr. Batav. c. 30. And it is to theſe or other cauſes of a ſimilar nature, that we ſhould apply the paſſages in the code, in which a right of repetition is denied in caſe of error of law, or confined to caſes of error in fact, as in *L.* 10. *cod. de jur. et fact. ign.* (*a*). *L.* 6. *cod. de cond. indeb.* (*b*). For the mere circumſtance of my having miſtaken the law, does not alone give you a juſt reaſon for retaining what was not in any manner due to you; and in this caſe it is better to favour the right of repetition, than the acquiſition of an adventitious gain. *L.* 41. § 1. *ff. de reg. jur.* (*c*)

(*a*) Vide ante, 414.

(*b*) Si per ignorantiam facti non debitam quantitatem, pro alio ſolviſti, et hoc adito rectore provinciæ fuerit probatum, hanc ei, cujus nomine ſoluta eſt, reſtitui eo agente providebit.

(*c*) Melius eſt favere repetitioni quam adventitio lucro.

NUMBER XIX.

SELECTIONS

FROM

THE PLEADINGS OF D'AGUESSEAU.

SINCE the greater part of this volume was printed, it has occurred to me to embrace the opportunity of inſerting the two following ſpecimens of the pleadings of D'Agueſſeau, in his character of Advocate General.

The nature of theſe compoſitions, as being the counſels of an aſſeſſor to the parliament of Paris, is explained in the preliminary obſervations of the preceding number of the Appendix, and alſo in the general Introduction to the preſent work.

The firſt of the following ſelections is an entire pleading upon the queſtion of legitimacy, in a caſe where the adultery of the wife was clearly manifeſt, and there was conſiderable reaſon to infer, but not abſolute ground to conclude, the non-acceſs of the huſband. I have fixed upon this production as an inſtance of co-incidence with the Engliſh law, and as a perſpicuous explication of the general principles which prevail with reſpect to the important ſubject of the diſcuſſion.

The other is an abridgment of the two pleadings, in the caſe of the Princes de Conty, from which I had inſerted a few extracts in the courſe of the preſent volume, previous to my forming the intention of giving this more extenſive view of them.

The following is a ſlight ſketch of the ſubjects embraced in this cauſe:

The Duke de Longueville, who was alſo Abbé d'Orleans, being a perſon of a weak frame of mind, but having a teſtable capacity, made a will by which he gave his property to his brother the Count de St. Pol, whom he inſtituted his heir; and in caſe of his death without iſſue, he inſtituted his mother Madame de Longueville as heir, praying her at her deceaſe, to diſpoſe of the property in favour of his Couſins German the Princes de Conty; and by a general clauſe directing that his will ſhould avail as a teſtament, a codicil, or in any other way by which it lawfully might. Afterwards he made another will, whereby

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the right, before intended for the Princes de Conty, would in effect devolve upon Madame de Nemours, his half-ſiſter as heir by blood, but which latter will was impeached on the ground of inſanity; and it was an undiſputed fact, that he was in a very ſhort time afterwards in a ſtate of abſolute madneſs, which continued until his death, during a period of ſeveral years; the Count de St. Pol, and Madam de Longueville, having died before him.

The firſt pleading was upon an appeal from a ſentence upon a ſuit inſtituted by the Prince de Conty, and admitting him to prove by witneſſes, the incapacity of the teſtator at the time of the ſecond will; it being the courſe of the law of France not to allow a proof by witneſſes, without an expreſs ſentence for the purpoſe.

Upon the hearing of this appeal, the firſt queſtion was, with reſpect to the validity of the title of the Princes de Conty, under the former will, and involved a diſcuſſion of the general rules of the Roman Law, reſpecting teſtamentary diſpoſitions, which was followed in the Province where the queſtion aroſe. Originally a will could only be made by the inſtitution of an heir, and in caſe of the death of the inſtituted heir before the teſtator, or his refuſal of the ſucceſſion, the whole will became void; afterwards the uſe of ſubſtitutions was invented, by which a different heir might be appointed, in caſe of the ſucceſſion not being taken by the firſt; but this was merely an alternative, and if the firſt did take the ſucceſſion, the ſubſtitution could not attach. At a latter period fideicommiſſa *were invented, by which the inſtituted heir was directed to reſtore the ſucceſſion to a third party. Theſe were analogous, partly to truſts, and partly to limitations in remainder in the Engliſh Law, but (reverſing the caſe of a ſubſtitution) could not take effect, unleſs the ſucceſſion had been taken by the inſtituted heir.*

A codicil (according to one ſignification of the term) is of nearly cotemporary inſtitution, and is a prayer, which has an obligatory force addreſſed to the heir by blood, to perform the diſpoſitions which it contains; and a clauſe directing that a teſtament ſhall take effect, as a codicil (called a codicillary clauſe) gives the teſtament the ſame effect as a proper codicil.

The points eſtabliſhed in the appeal are, that the diſpoſition to the Princes de Conty was a fidei commiſſum, and as the heir firſt inſtituted, and the heir who was ſubſtituted, both died before the teſtator, it could not take effect in that character, but that by virtue of the codicillary clauſe, the diſpoſition was obligatory upon Madame de Nemours, the heir by blood.

This being eſtabliſhed, the objections to receiving proof by witneſſes of the incapacity of the teſtator at the time of making the ſecond will, which were founded upon the reaſonableneſs of the will itſelf, and upon certain other inſtruments executed about the ſame time, were taken into conſideration, the general principles reſpecting the capacity of teſtators

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were expounded, and it was ſhewn that a proof by witneſſes was neceſſary to elucidate the fact, and that no concluſion of ſanity could be drawn from the inſtruments themſelves.

The proof by witneſſes having been taken, a general ſentence was pronounced in favour of the title under the firſt will, and ſupporting the allegation of inſanity as affecting the ſecond. And the ſecond pleading is upon an appeal from that ſentence. After examining ſeveral exceptions to the witneſſes, it was firſt ſhewn that the former ſentence had effectively decided upon the validity of the firſt will; as the proof adduced only related to the ſecond, and would have been nugatory, unleſs the court had eſtabliſhed the validity of the firſt. It was then ſhewn that even ſuppoſing the queſtion to be entire, the ſame concluſion ought to be drawn. The general nature of the ſanity requiſite in caſes of teſtaments, and the principles applicable to the proof of it, were ſtated with more particularity. The inferences ariſing from written inſtruments were examined, and it being then eſtabliſhed that the caſe muſt be decided by witneſſes, the particulars of the evidence were obſerved upon terminating in a concluſion of the fact of inſanity; and laſtly, the argument that the will might be made during a lucid interval, was diſcuſſed and refuted.

It will perhaps be thought that the concluſion of inſanity might, under the circumſtances, have been drawn with much leſs difficulty, as the facts ſeem too ſtrong to be reconciled with any other ſuppoſition, and the diſcuſſion may perhaps in other reſpects be looked upon as too florid and diffuſe; but the knowledge, and ability, and eloquence which it exhibits, will, I hope, through all the imperfections of a tranſlation, diſplay the very maſterly talents of its author.

The abridgment which I have made conſiſts in the omiſſion of the arguments of counſel, of the refutation of an argument that the Prince de Conty was entitled to a deciſion, independently of the effect of the codicillary clauſe, and of the repetition in the ſecond pleading of ſome of the ſtatements, and obſervations in the firſt.

The pleadings as preſerved are in fact only preparative notes, found in the poſſeſſion of the writer at his deceaſe, after an interval of 50 years. The pleadings actually pronounced were not read, or repeated, but ſpoken in the language ſuggeſting itſelf at the time. It is ſaid in a prefatory advertiſement, that the fire which animated him at the time of ſpeaking, excited ſtill more brilliant images, more ſublime thoughts, more forcible reflections, than thoſe which preſented themſelves at the time of compoſition, ſo that the pleadings which ſtrike the moſt in reading would have even a ſuperior ſtrength and beauty, if it had been poſſible to print them as they were pronounced.

CASE

OF THE

SIEUR BOUILLEROT DE VINANTES (a).

The queſtion relates to the ſtate of a child, whoſe mother had concealed her pregnancy, and had been condemned for adultery, without the ſentence declaring the child to be a baſtard; the huſband having been only abſent from his wife three months.

THIS cauſe is as much diſtinguiſhed by the name and merit of thoſe who have been engaged in it, as by its own importance, which has juſtly attracted the attention and concourſe of the public. The *arrêt* which you are to pronounce will for ever eſtabliſh the real principles for deciding upon queſtions of parentage; which are the ſolid foundations of the different ſtates of civil ſociety.

You have heard the ſon of a guilty mother, diſavowed by him whom he calls his father, imploring in your audience the authority of the laws, the force of preſumptions, the name and favour of marriage.

You have ſeen an unfortunate huſband, compelled to renew the recollection of the crime of his wife and of his own diſhonour; always equally to be commiſerated if you pronounce againſt him, whether blinded by his paſſion he diſavows his own blood, or obliged by the authority of the law to acknowledge as his ſon, one whom adultery has introduced into his family.

A third party appears in the cauſe, but it is only to increaſe the doubt and uncertainty of it; and the deſtiny of the child whoſe ſtate is the ſubject in diſpute, is ſo unfortunate that he cannot find a certain father, either in the honourable connection of marriage, or in the criminal engagement of adultery.

Great as his misfortunes are, he ſhould look forward to a more favourable deſtiny, ſince in his defence an illuſtrious protector has entered upon a career, which will be equally glorious to himſelf,

(a) This pleading was pronounced in 1693; and is the 23d in the printed collection.

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and advantageous to the public (*a*). His name alone will be a favourable omen to thoſe whoſe intereſts he ſupports, and his merit will not require the aſſiſtance of his name, to render him the ſtrength of the weak, and the aſylum of the unhappy.

What muſt have been the joy of that great man who revives in him, if he could have been witneſs of this auſpicious outſet, and ſeen the heir of his name defend the cauſe, of the pupil whom he had taken under his protection, with the ſame eloquence which you daily admire in him, who, in the advancement of juſtice, ſupports with ſo much dignity the cauſe and the intereſts of the public. Such is the recompence which heaven allots to virtue, ſuch are the benedictions which the Scripture has promiſed to the juſt, and has accompliſhed in the perſon of that great Magiſtrate, whoſe name will endure as long as this aſſembly. *Eccleſiaſtic.* Ch. 35.—4. *Mortuus eſt, et quaſi non eſt mortuus; ſimilem enim reliquit ſibi poſt ſe.* The fact which gives riſe to the preſent conteſt, is as clear as the deciſion upon it is important.

Nicholas Bouillerot, ſieur de Vinantes, Maitre d'Hotel of the ducheſs of *Orleans*, in the year 1664 married *Marie-Anne de Launе*, who was then about 12 or 13 years of age. This marriage, which was happy in its commencement, was followed by the birth of ſeven children whoſe ſtate is certain: death has taken away five of theſe, two of them only now remain, and the appellant inſiſts that he is a third.

Whether the conduct of the *Dame de Vinantes* was for a long time innocent, or whether her irregularities were kept ſecret, nothing appears to have diſturbed the tranquillity of the marriage until the year 1690, or rather until the birth of the appellant. His birth, which confirmed the ſuſpicions that the huſband had already conceived againſt his wife, appears to have determined him in preferring an accuſation of adultery.

We ſhall ſtate in the ſequel, with more particularity, the circumſtances which accompanied the birth of this child, and the inferences which have been drawn from them, to prove that he owes his life to the criminality of his mother. But we cannot forbear obſerving at preſent, that his birth was for a long time concealed, and that the knowledge of it was ſtudiouſly withheld from the huſband, from the public, and the church; that even the nurſe to whom he was intruſted was not informed of the ſecret of his origin; and that he would not even yet have received the ceremony of baptiſm, if the curé (*b*) of the pariſh, being apprized of the

(*a*) M. Chretien de Lamoignon, ſon of M. de Lamoignon; then firſt Advocate General, and grandſon of the firſt preſident Lamoignon.

(*b*) Anſwering to Rector.

neglect, had not urged the *Dame de Vinantes* at length to acknowledge her quality of mother, by having the child baptized in her name. The circumſtances of this baptiſm are the ſtrongeſt proofs which are oppoſed to the child whoſe ſtate is in diſpute.

Three months after his birth, an unknown woman of another pariſh, brought him at 10 o'clock in the evening, of the year 1690, to the church of *la Ferté Loupiere*; ſhe declared that he had been baptized (*a*); that he was the ſon of *Marie de Laune*, wife of the *Sieur de Vinantes*; (ſhe did not name the father,) no relations were preſent at this ceremony. The nurſe was the god-mother, the beadle the god-father, and the ſpiritual birth of the appellant in the church was as much concealed as his natural birth was obſcure. The nurſe took him thence with her with the ſame ſecrecy. But whatever care was taken to conceal this ceremony, the ſhades which kept the knowledge of it from the huſband were removed. The birth of this child, the myſtery with which he was bringing up, the obſcurity of his baptiſm, awakened his former ſuſpicions, and he thought it time to inſtitute the charge of adultery againſt his wife.

He repreſented to the Lieutenant Criminal, the juſt complaints which he alleged himſelf to have againſt his wife. He ſtated that he ſhould equally betray the intereſts of his own honour, and that of his real children, if he any longer deferred demanding vengeance of a crime which was but too certain. He ſtated all the circumſtances, the ſuſpicious reſidence of his wife in a houſe in the country, the continual viſits of the *Sieur Quinquet*, the ſecret birth of an illegitimate ſon, conceived during his abſence, and who could only be regarded as a living proof of the irregularities of the mother.

The huſband was ſo unfortunate as to prove by a great number of witneſſes the ſcandalous deportment of his wife. They mentioned ſeveral important facts; the pregnancy concealed from the public; the ſtill more ſecret delivery; the *Sieur Quinquet* alone apprized of the birth of the child whom he diſavows; his almoſt parental cares; the repeated confeſſions which the mother had made of her criminality; and her contradictory declarations reſpecting the ſtate of her ſon.

All theſe grave, important, and deciſive facts, obliged the judges to award a judgment for her apprehenſion. Conducted to the priſons of the *Châtelet*, ſhe at firſt confeſſed her crime, and ſoon afterwards repenting of her ſincerity, ſhe furniſhed, by her denial, ſtronger proofs againſt herſelf, and even againſt her ſon, than ſhe had done by her acknowledgment.

(*a*) That is ſprinkled, (ordoyé,) as appears by the ſequel. Note in the original.

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Her proceſs was carried on and perfected; the witneſſes were examined and confronted; never was a crime more clearly proved; the ſentences of the firſt judges, condemned her to all the puniſhments directed by the authentic. The property of her portion was adjudged to her children, the uſufruct to her huſband. The *Sieur Quinquet* was condemned to baniſhment for contumacy.

The appeal which *Marie de Laune* inſtituted againſt this judgment ſerved only to render her diſgrace the more public. The ſentence was confirmed by an *arrêt*, to which there has not even yet been any oppoſition.

Quinquet was more fortunate; he ſurrendered; he purged his contumacy; he appeared criminal, but the number of offenders, and the forbearance of the huſband during a long ſcene of public diſturbance, excuſed or diminiſhed his crime. The ſecond ſentence moderated the puniſhment pronounced by the firſt; and the court ſoftening ſtill farther the ſeverity even of the latter judgment, condemned him only to pay the huſband his coſts.

Such, Sirs, was the commencement, the progreſs, and the termination of the accuſation preferred by the huſband againſt his wife, and againſt the laſt accomplice of her miſconduct.

It is time, however, to ſtate the procedure which was inſtituted, to aſſure the ſtate of the child, who had received his birth during the long continuance of the illicit intercourſe, between the *Dame de Vinantes* and the *Sieur Quinquet*.

Whether *Maria Berthelot*, his nurſe, was abſolutely ignorant who was the real father, or whether her ignorance was only affected, ſhe at firſt required to be paid for her care of the child, by *Magdeleine Landry*, who had placed him with her immediately on his birth.

Magdeleine Landry declared that the child did not belong to her, and that ſhe had done nothing except by order of the *Dame de Vinantes*, to whom the nurſe muſt look for payment.

Upon this declaration, the nurſe aſſigned the *Sieur de Vinantes* before the *Bailli de Montargis*; and took the ſame concluſions againſt him.

The cauſe was referred to the *Requettes du Palais*. The father diſavows the perſon who is alleged to be his ſon, and demands that the *Sieur Quinquet* ſhall be obliged to acknowledge him.

A tutor was appointed for the child, to defend his ſtate.

The cauſe was ſolemnly pleaded at ſeveral audiences. A ſentence was pronounced, appointing a diſcuſſion of the principal queſtion, and directing, that in the mean time the child ſhall be proviſionally allowed the ſum of 500 livres a-year, from the property of his mother.

The parties have reſpectively appealed from this appointment. Each ſide equally demand an abſolute judgment in their own favour; and contend that the cauſe will never be more ripe for judgment than it is at preſent, and that you ought now either to confirm the ſtate of the child, or reſtore to an unfortunate huſband the tranquillity which he has been deprived of, by the criminal conduct of his wife.

On the part of the child whoſe ſtate is conteſted, you have heard the different kinds of proofs which were introduced, by cuſtom, in an age of ignorance, to prove the reality of birth, and to aſſure the legitimacy of children, and without dwelling upon thoſe arguments which are always equally uncertain and dangerous, the caſe was reſted upon an explication of the principles eſtabliſhed by the *Roman* juriſprudence, or rather by equity and public utility.

Of however great importance the certainty of filiation and legitimacy may be, it muſt be admitted that nature refuſes the proof of it, becauſe it depends upon the unknown moment of conception.

Such is the diſpoſition of the laws, and this maxim is not a vain ſubtilty of the juriſts; it is a principle founded upon natural reaſon, and common to every ſyſtem of juriſprudence.

In defect of legitimate proofs, recourſe muſt be had to preſumptions. If theſe are of great importance in other caſes, they are deciſive with reſpect to filiation, and it is with that view that the laws have fixed the number, and determined the nature of them.

The mother is always certain, the father is uncertain. Where amidſt this uncertainty ſhall we find the rule for aſſuring the ſtate of children, but in the legitimate preſumption, which the name of marriage induces in favour of thoſe who are born under its ſacred protection? *L. 5. ff. de in jus. vocando. Pater is eſt quem nuptiæ demonſtrant.*

The dignity of marriage, the preſervation of families, the order of ſucceſſions, the unanimous concurrence of writers; eſtabliſhed this rule as an inviolable principle; your *arrêts* have always followed it in their diſpoſitions, and as the law gives it the whole force of its authority, it can never be invalidated except in thoſe caſes, which are indicated by the law itſelf.

Juriſts recognize only two circumſtances, which can balance the force and authority of this preſumption.

The firſt, is the abſence of the huſband; the ſecond, an infirmity which will not ſuffer him to claim the name of a father.

Whatever colour may have been given to this cauſe, it is impoſſible

impoſſible that either of theſe exceptions can be applied to it.

The argument deduced from the abſence of the *Sieur de Vinantes*, is a frivolous pretext, deſtroyed by the circumſtances that were adduced to eſtabliſh it.

It is true that he was abſent for three months, but the pregnancy of his wife might have preceded his abſence, or been ſubſequent to his return, without infringing the rules of nature or probability; and beſides, when the diſtance between the place of his reſidence, and that of his ſervice, was ſo inconſiderable, who can tell whether he was always ſeparated from his wife, and whether his continuance at *Paris* would ever be conſidered as interrupted?

If this abſence cannot juſtify his diſavowal of his ſon, what weight is there in the other arguments, by which he would exclude the light of truth?

If it is contended that the *arrêt* which adjudges the mother to be criminal, has declared the ſon to be illegitimate, it is anſwered in the firſt place, that the child was no party to this *arrêt*, and in caſe it is adduced againſt him, he formally declares his oppoſition to it; but further, he maintains that it cannot be regarded as any prejudice againſt him; that no conſequence as to his ſtate can be drawn from the crime of his mother, and that ſhe might be guilty without his being illegitimate. The diſpoſition of the law, *Miles*, 11. § 9. *ad legem Juliam de Adulteriis*, may be ſucceſsfully applied to this cauſe. *Non utique crimen adulterii quod mulieri objicitur, infanti præjudicat, cum poſſit et illa adultera eſſe, et impubes defunctum patrem habuiſſe.*

In fact ſo far is this *arrêt* from containing any thing which can be oppoſed to him, that he conceives it to be entirely in his favour.

The huſband, blinded by his paſſion, ſeeks to puniſh the mother in the perſon of her child; he diſavows his own ſon; he alleges his birth as one of the principal proofs of the adultery. The proceſs is inſtituted. The preſumptions, the *indicia*, the conjectures are examined. The mother is condemned, but the ſon is not excluded from the family of the huſband; and this ſilence with regard to him is a formal judgment in his favour, ſince having been born during marriage, and not having been declared a baſtard, he muſt neceſſarily be a legitimate child.

If the *Sieur de Vinantes* would oppoſe to his ſon the declarations of his wife, the ſon will invoke in his favour the authority of the law, which does not ſubject the ſtate of children to the abſolute power of their parents, nor, in a matter of ſuch importance, liſten

to declarations which are as ſuſpicious in fact, as they are uſeleſs in law.

The perſon who makes theſe acknowledgments, is a woman accuſed of a crime, animated by the deſire of avenging herſelf upon her huſband, or intimidated by the fear of the puniſhment ſhe had merited, ſeeking to deprive her huſband of a legitimate heir, or wiſhing to purchaſe his clemency, at the price of the ſtate, and fortune of her ſon.

If the crime of the mother, the *arrêt* which condemns her, the diſavowal of the father, can never prejudice the quality of the appellant, he hopes that by aſſuring his ſtate, you will confirm the moſt authentic title by which the birth of children can be proved.

But if the court has any difficulty in pronouncing at preſent abſolutely in his favour, he maintains that the ſentence of the *requêtes du palais*, muſt at any rate be deemed invalid, becauſe it is repugnant to all the principles of law; which unanimouſly give proviſion to thoſe in poſſeſſion of their ſtate, and beſides that its execution is impoſſible. It only allows aliment to the appellant, from the property of his mother. Now his mother has no property, ſhe loſt it by her crime: it was adjudged to her huſband, and to the other children whoſe ſtate is not diſputed, and even if the court ſhould defer the judgment of this cauſe until the time of his majority, he inſiſts that the favour of the preſumption in his behalf, the quality of the conteſt, and the very name of marriage are ſufficient titles, for adjudging him a proviſion until he is confirmed in the peaceable poſſeſſion of his ſtate.

However ſtrong theſe conſiderations may be, their authority is balanced by the very name of the father, in the perſon who oppoſes them, by the judgment which he pronounces againſt his aſſerted ſon, by the preſumptions which he borrows from the facts, by the proofs which the declarations, and the conduct of his wife, furniſh him with againſt the ſtate of the child,

He admits that the authority of writers, and the juriſprudence of *arrêts*, ſeem to oppoſe an invincible obſtacle to him, in the common and eſtabliſhed maxim, that *Pater is eſt quem nuptiæ demonſtrant.*

It is however this principle which he calls in queſtion. He offers to ſhew that this rule, however general it appears, is not without exception, that it only forms a probable preſumption which may be deſtroyed by evidence to the contrary.

It is ſuppoſed that the inclinations of a huſband and a wife are conformable to their ſtate, and to the object of their engagement.

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The law does not attend to the abſurd caprice of a huſband, *L. 6. ff. de his qui ſui vel al. jur. Qui cum uxore ſuâ aſſidue moratus, nolit filium agnoſcere*; and whilſt the birth of children can be aſcribed to a legitimate ſource, the law will not ſuppoſe criminality, in order to diſturb the peace and repoſe of families.

Such is the nature of this preſumption; probability and the appearance of truth are the foundation of it; but as it frequently happens that nothing is more diſtant from the reality of truth than the appearance of it, and as falſehood itſelf has often the ſemblance of probability, this preſumption is like all others which depend upon the ſame principle; they may be deſtroyed by other arguments, and if that probability from which they derive their only force, is combated by more ſolid reaſons, the judges reject theſe deluſive phantoms (*fauſſes lueurs*,) to give their ſuffrages to the real light of truth.

This is the judgment even of the juriſts themſelves, who authoriſe the preſumption.

The title under which it appears is entirely foreign to queſtions of ſtate. The caſe in which it is propoſed, has no relation to the quality of a legitimate child.

If this rule had occurred under the title *De Statu hominum*, and not in that *de in jus. vocando*, the juriſt would have developed its principle, its conſequences, and its exceptions; the purpoſe for which it was mentioned, rather required it to be propoſed than examined; he thought it ſufficient curſorily to indicate it, and it is not to be concluded from his ſilence that it can never be impeached, ſince this omiſſion is ſupplied in ſeveral other titles of the law.

If we glance over all the diſpoſitions of the laws upon this ſubject, we ſhall find that the ſame probability, which occaſions this principle to be eſtabliſhed, with regard to children born in marriage, has induced the juriſts to extend it to children who owe their exiſtence to a concubine; and as in this laſt caſe, nobody doubts but that the argument may be repelled, it ought to be acknowledged that it is of no higher authority in reſpect to marriage.

The whole title *de agnoſcendis liberis*, may be conſidered as a general exception to the rule, *Pater eſt quem nuptiæ demonſtrant.*

The law diſtinguiſhes three kinds of caſes, in which the quality of filiation, and legitimacy, may be conteſted.

The child is born either during the marriage, or after the ſeparation of the huſband and wife by a divorce; or laſtly, after the diſſolution of the marriage by death.

Now in all theſe caſes, the law teaches us that the ſtate is not entirely

entirely assured, that the mere name of marriage does not place it out of the reach of examination, that it may be assailed by every kind of proof, that an oath may be required from the mother, and that even after she has taken it, the legitimacy of the child may be disputed.

The law makes no distinction; every kind of argument may be received, inability, absence of the husband, enmity, forced or voluntary separation, the disavowal or the acknowledgment of the father; in a word, every proof resulting from the circumstances of the case, that natural conviction, those silent *indicia*, which time, or place, or persons may furnish upon these occasions, proofs the less suspicious as they are the more spontaneous. Justice admits all these elucidations, and never did they occur in greater numbers than in the present cause.

The crime manifest, public, acknowledged, the absence of the husband at the time of the conception, the presence of the adulterer, the pregnancy unknown to the husband, the domestics and the neighbours, the birth of the child made a secret, the ceremonies of his baptism deferred, his nurture a secret; the denial of so evident a fact, in the interrogatories of the mother.

Who can believe that this child was the pledge of a legitimate union, when we see a mother solicitous of concealment, placing her child in unknown hands, fearful that the confidents of her misfortune might betray it, stifling the sentiments of nature towards her own blood, acknowledging that the birth of the child is a necessary proof of her guilt; declaring to some of the witnesses that he is not the son of her husband, renewing this declaration at the face of the altar, in the register of baptisms, which contains the most solemn proof of the state of individuals?

However great the favour of ordinary presumptions may be, can it be compared to so many different proofs, which are not less strong against the *Sieur Quinquet*, than against the person to whom he has given existence? Accomplice in the disorders of the mother, he alone was deemed worthy to witness the birth of the son; depositary of the secret, he betrayed himself by his care in the nurture and maintenance of the child.

It is hoped that you will not suffer him to add to the injury, which he has done to the husband, the mortification of giving him heirs in spite of himself, and obliging him to divide his fortune, between the children of his marriage, and the offspring of adultery; and treating as his son one whom he can never regard, but as a constant proof of the infidelity of his wife.

Lastly, the *Sieur de Quinquet* alleges in his favour the authority of your *arrêt*, which does not subject him to any punishment.

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If he is guilty, his guilt is divided with many others, and he is ſurprized to find the *Sieur de Vinantes* fixing upon him alone as the object of his ſuſpicions.

He advances the ſame principles which were urged on the part of the child. To theſe he adds circumſtances of fact, perſonal to himſelf; he produces a certificate, to ſhew that he was abſent at the ſame time as the huſband. He contends that the parental cares which are now imputed to him, are facts which may flatter the vengeance of an irritated huſband, but cannot detract from thoſe inviolable rules which public order has eſtabliſhed, and which you never can maintain in any cauſe more diſtinguiſhed and important than the preſent.

WITH RESPECT TO OURSELVES, after having laid before you the reſpective intereſts, and the principal arguments of the parties, it might ſeem that the natural order of the caſe would oblige us here to examine a preliminary queſtion, which, in the *Roman* law, always preceded the judgment in cauſes of ſtate, ſuch as that at preſent before us; that is whether we ought at preſent to enquire into the condition of the child, or defer the judgment until he attains his majority?

But this queſtion appears to us of ſlight importance, and when we conſider the ſtate of the conteſt, we do not ſee any obſtacle which requires you to ſuſpend the judgment of it.

We know that the laws are watchful, to preſerve the honour and dignity of families; that they take minors under their protection; that their weakneſs is the meaſure of the defence afforded to them; and although their tutor is charged with all the circumſpection of the law, and his power is compared to that of a father, and a maſter, the juriſts have deemed it dangerous, to allow the ſtate of a child to depend upon the fidelity of his tutor, and hold that this important judgment which is to be deciſive of the whole fortune of his life, ought to be deferred to a more mature age, when the minor, capable of defending himſelf, can only impute the failure of his cauſe to his own neglect or misfortune.

Whatever reſpect we may have for the deciſions of the great men, who are the authors of theſe laws, we think it may be affirmed that our uſages have not adopted them, that nothing is more common, than to agitate in this tribunal queſtions of ſtate on behalf of a minor, and even of a child under the age of puberty; and that on the other hand it would be difficult to find any inſtances, of a practice conformable to the *Roman* juriſprudence.

But beſides, even if this cauſe was to be decided by thoſe laws, and had been pleaded before the Prætor, who propoſed the *edictum carbonianum*, it would be eaſy to ſhew that we might be allowed

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to anticipate the age of puberty, and to give at preſent a definitive judgment.

To decide this queſtion, it would be ſufficient to cite the authority of the reſcript of the emperor Adrian, which we ſhould enfeeble by ſtating in any other terms than its own. *ff. de carb. ed. L.* 3. § 5. *Si Pupilli idoneos habeant a quibus defendantur et tam expeditam cauſam ut ipſorum interſit maturè de ea judicari et Tutores eorum judicio experiri velint, non debet adverſus pupillos obſervari quod pro ipſis excogitatum eſt.*

We ſhall not make any application of theſe words, the court can form a better judgment than we can do, whether the child can ever hope for a better defence, than he has had in your audience.

The tutor demands a judgment. All the parties conſent to it. Written documents, witneſſes, all the arguments both of fact and law, are fully brought forward.

If the quality of a legitimate ſon is eſtabliſhed by all theſe proofs, can we leave in ſuſpence, a ſtate which ought to be aſſured? And if on the contrary it is deſtroyed, equity will not ſuffer the repoſe of a whole family to be expoſed to all the variations of the will of a minor, who, having nothing to fear for himſelf, may trouble with impunity the tranquillity of the real children.

We confine ourſelves then to the real queſtion in the cauſe, which conſiſts in comparing the force of the preſumptions alleged on the one ſide and the other; and entering into an examination of the proofs which the law has eſtabliſhed, and to the difficult exerciſe of that diſcernment, upon which the cauſe entirely depends.

It ſeems at firſt ſight, that what we call an important queſtion hardly merits the name, and that to decide it, it is ſufficient to ſay in a word—The child was born during the continuance of a legitimate marriage; can there be any doubt as to the father, when the law has pointed him out, and, to uſe the expreſſions conſecrated to the ſubject, when marriage has demonſtrated him?

Yet this principle is now aſſailed, and it is from the very law which eſtabliſhes it, that arms have been borrowed to combat it; and when we examine the objections that have been oppoſed to it, with ſo much erudition and eloquence, it ſeems that the maxim, if not deſtroyed, has loſt at leaſt a part of its authority.

Permit us, Sirs, before we enter upon the examination of theſe objections, to propoſe, in a very few words, the general principles eſtabliſhed by the laws and the writers with regard to the proof of filiation, and the quality of legitimacy.

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If it were neceſſary here to treat of the nature of proofs in general, it would be eaſy to ſhew that the greater part of the truths, which are the ſubject of queſtions of ſtate, are not natural and immutable truths, but poſitive and arbitrary, depending on the inconſtancy of the will, and as they are uncertain in their nature, the proofs upon which they are founded can never have that character of firmneſs and evidence which is capable of producing an entire conviction, and forming a perfect demonſtration. Allthe wit of man, all the prudence of judges, conſiſts in deducing from a known fact, a certain conſequence by which they may attain the knowledge of another fact that is doubtful.

If it were permitted to enter into the detail of different proofs, it would be eaſy to ſhew that they might all be referred to this general rule; and that it is only by the ſuppoſition of one fact as certain, that they lead the mind to the diſcovery of another which is obſcure and difficult.

Thus when it is certain, that a perſon accuſed had an intereſt to commit the crime imputed to him, it is concluded to be probable that he did commit it; when minority is clear, it is eaſily preſumed, that there was inequality in a contract (*a*); and laſtly, if a child is born in the courſe of marriage, it is natural to believe that the mother is innocent, and that the huſband is the real father.

Such in general is the nature of theſe arguments. Let us however examine wherein they are diſtinguiſhable, and whether ſome of them are not more favourable and efficacious than others.

Every preſumption is founded upon the natural connection, which ſubſiſts between the truth which is known, and that which is ſought for; and as this connection may be more or leſs neceſſary, it is evident that the preſumptions may be more or leſs infallible, and that the degree of certainty will depend upon the relation, between the fact which is known and that which is not.

If it is a neceſſary connection, it is impoſſible that the firſt truth can be certain, and the ſecond, doubtful; the preſumption is then conſidered as the moſt certain proof, and will alone produce a perfect conviction in the mind of a judge.

Thus to ſhew the falſity of an inſtrument, it is proved by authentic teſtimony, that the perſon by whom it appears to have been ſigned, was abſent on the day of the act being paſſed; this fact alone is a ſufficient proof of the fabrication; becauſe if the abſence is certain, it is impoſſible that the act can be true.

(*a*) On preſume facilement la lezion.

If, on the contrary, the fact to be proved is not abſolutely a neceſſary conſequence of that which is certain, the preſumption is only probable, and then the doctors make a diſtinction, the preſumption is either expreſsly recognized and approved by the law, or it is not ſo.

In the firſt caſe, although the argument is not ſo ſtrong as to exclude all proof to the contrary, it is nevertheleſs conſidered as true, until it is deſtroyed by invincible arguments.

If the law does not authorize the preſumption, it ſubmits it to the prudence of the judge.

Let us apply theſe principles to the preſumption before us. Two characters are eſſential to a preſumption to render it deciſive, or at leaſt to have it conſidered as the truth until it is deſtroyed.

The firſt is, that it be founded upon a neceſſary and infallible connection, between the fact which is known, with that which is to be proved.

The ſecond, that it be authorized by the law. Let us examine whether theſe two characters accord with the preſumption under examination? Whether it is infallible? Whether it is legitimate?

The fact ſuppoſed from which the conſequence is drawn, that *pater eſt quem nuptiæ demonſtrant*, is the certainty and truth of the marriage, and that being aſcertained, it is concluded that the child born under the ſacred name of marriage is legitimate. But is this concluſion neceſſarily infallible, indubitable? Does its certainty exclude every proof to the contrary? We think we ſhould abuſe the time allowed by the court for the judgment of this cauſe, if we were to dwell upon the proof that nothing is farther from the fact.

We ſhall not here repeat all the diſpoſitions of the laws, which have been cited in ſupport of this principle.

The whole of the title *de agnoſcendis liberis*, is full of theſe deciſions. The juriſts every where acknowledge, that notwithſtanding this preſumption in favour of children, the father may always diſavow them, provided he can ſhew by certain proofs that they owe their exiſtence to the guilt of their mother. Even the ſilence of the father, his tacit acknowledgments, the omiſſion of the requiſite formalities, cannot deprive him of the right of conteſting the birth of the perſon alleged to be his ſon.

Si, uxore denuntiante ſe prægnantem, maritus non negaverit, ſive maritus neglexerit facere quæ ex Senatusconſulto debet, natum cogitur omnimodo alere, cæterum recuſare poterit filium. *L.* 1. § 14 & 15. *ff. de agn. liberis.*

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The effect of the preſumption, according to this law, is confined to obliging the father, even when by his ſilence he has acknowledged the ſtate of the child, to provide him with aliments; but even whilſt it ordains this proviſion, he may refuſe him the quality of a legitimate child.

We forbear adding to this authority all the others which have been cited. The court muſt remember the force and ſolidity with which the maxim was proved, and beſides we think that the principles which we have eſtabliſhed, reſpecting the quality of preſumptions, are ſufficient to ſhew that this common argument, not being founded upon an infallible conſequence, can only be conſidered as a probable preſumption, as a powerful conjecture, but as one which may be combated by proofs more ſtrong and convincing; and if it were poſſible to doubt this maxim, it would be ſufficiently eſtabliſhed by the very name of an adulterine baſtard; a name which could not be known to the ſcience of juriſprudence, if it were impoſſible that a child conceived (*a*) during marriage could be illegitimate.

But if this preſumption has not the firſt condition, which is neceſſary to render it deciſive, it has at leaſt the ſecond, which is ſufficient to render it legitimate. It is written in the law, it is inveſted with its authority, it has a character which every writer on the ſubject, and which your *arrêts* have always reſpected.

Public utility, the repoſe of families, the tranquillity of marriages, are the ſolid foundations upon which it is eſtabliſhed, and the ſame reaſons which originally occaſioned its introduction, have induced you to preſerve it in all its force.

Let us add another motive which renders this preſumption almoſt inviolable, that is the impoſſibility which commonly exiſts of proving the contrary, and in a caſe of doubt, the law always preſumes in favour of the innocence of the mother, and the ſtate of the child.

Let us combine theſe principles, and conclude with all the writers, that if this preſumption is not infallible, it is at leaſt very legitimate, and that if on the one hand it is open to a proof of the contrary, on the other it is conſidered as the truth, until it is deſtroyed.

But what is the proof which the law allows to be oppoſed to it? This it will be eaſy to explain, by the ſame principles.

(*a*) This is not quite correct, as the term is applied to the illegitimate child of a married man, by a ſingle woman.

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The preſumption capable of oppoſing that of the law, ought to be written in the law itſelf; it ought to be founded on an infallible principle, before it can deſtroy a probability ſo great as that which is the foundation of this proof.

Now it is evident that, if we adhere to theſe maxims, there are but two exceptions to the general rule, both of them founded upon a phyſical and certain impoſſibility of the preſumption being true.

They are contained in the law itſelf, which gives the definition of a legitimate ſon.

Filium eum definimus qui ex viro et uxore ejus naſcitur, ſed ſi fingamus abfuiſſe maritum, verbi gratia per decennium, ſed ſi ea valetudine fuit ut generare non poſſit, hunc qui in domo natus eſt, licet vicinis ſcientibus, filium non eſſe. *L. 6. ff.* De his qui ſui vel alieni juris ſunt.

There are then only two proofs, which can be oppoſed to ſo favourable a preſumption.

The long abſence of the huſband, and we may add conformably to the ſpirit of the law, that this abſence muſt be certain, and continual.

Incapacity, either permanent or temporary, is the ſecond. The law allows no other, and it is evidently impoſſible even to imagine any other, ſince ſo long as there is neither abſence, nor any obſtacle which ſeparates thoſe whom marriage has united, it will never be preſumed that the huſband is not the real father.

Let us now apply theſe different principles, to the particular circumſtances of the preſent cauſe.

We might decide it at preſent, and as no proof has been given either of a long abſence, or of any other impediment, the preſumption of the law ought to ſubſiſt in all its force.

Yet as it has been argued that the combination of all the different preſumptions, ariſing from the facts of the caſe, may be compared to the general exceptions contained in the law, we are obliged to enter into the diſcuſſion of theſe arguments, and thereby finiſh the examination of the cauſe.

The abſence of the huſband, the preſence of the adulterer, the ſecrecy which was given to the pregnancy of the wife, and the birth of the child, the circumſtances which accompanied it, the obſcurity of his nurture, the cares of the *Sieur de Quinquet*, the declarations of the mother, the diſavowal of the father; theſe are principal grounds which have been urged in oppoſition to the legitimacy of the child.

To anſwer theſe arguments, we feel it our duty, in the firſt place,

to

to aſcertain the facts, and afterwards to examine the inferences which have been drawn from them.

We have not here to treat of one of the ordinary queſtions in caſes of ſtate, to determine whether proof by witneſſes ſhall be admitted. This proof has already been made, in convicting the mother of the adultery of which ſhe was accuſed; and it is contended that the quality of adulterine baſtard in the ſon is thereby proved by anticipation.

It is in the information, then, that we are to ſeek for the proof of theſe facts.

The firſt is the abſence of the huſband for three months. The ſecond, the preſence of the adulterer. Both theſe facts appear from the informations. The eighth witneſs ſtates as follows: (*here the depoſition was read.*)

Beſides the proof ariſing from this evidence, the mere quality of the huſband ſupports the fact. He had the honour to be an officer of the Ducheſs of *Orleans*, and he produces regular certificates, that he ſerved his quarter during the months of *April*, *May*, and *June*, in 1689.

The proof which the *Sieur de Quinquet* oppoſes to this argument does not appear to be of much importance: He produces a certificate of his being preſent at the review at *Montargis*, on the 4th of *May*, 1689. He adds an atteſtation which ſhews that he was ſerving that year in the ſecond battalion of the *Orleannois*. But what inference is to be drawn from theſe atteſtations? The firſt proves that he was abſent a ſingle day, in *May*, and the other ſpeaks in general of his ſervice, without ſhewing either its commencement, its continuance, or its concluſion.

The certainty of theſe two facts then cannot be diſputed: The abſence of the huſband for three months, and the preſence of the adulterer for the ſame time.

The ſecrecy of the pregnancy, the darkneſs and myſtery with which it was endeavoured to cover the birth of this child, are not leſs manifeſt.

(*The depoſition of the fifth witneſs read.*)

The public was ignorant of the pregnancy; the birth of the child was concealed; the endeavour to ſuppreſs the knowledge of it is atteſted by this evidence; and the depoſitions, which we are about to read, confirm ſtill farther the truth of this important fact.

In all the circumſtances which accompany the birth, we equally recognize the fear of the mother to render it public, and the care

which was taken by the *Sieur de Quinquet* of the child of whom he is alleged to be the father.

The detail of all theſe facts appears in the depoſition of *Magdeleine Landry*, the only depoſitary of the ſecret of her miſtreſs, and the only witneſs of the birth of the appellant.

(*Her depoſition read.*)

The facts which regard the *Sieur de Quinquet* are alſo confirmed by the depoſition of the ninth witneſs, who went to fetch him at the time of the delivery; and by the teſtimony of the ſixteenth witneſs, who declares that he brought to the *Valet of Quinquet* cloaths ſuitable for a child of three months old.

The circumſtances of the baptiſm, not leſs important than thoſe already mentioned, are exactly ſtated in the depoſition of the ſeventh witneſs.

Laſtly, you have heard all the different declarations of the mother; expreſs declarations related in the depoſitions of the witneſſes; and tacit declarations, ſtronger than the moſt formal acknowledgments, in all her conduct, in the pains to hide her pregnancy, and to conceal the birth of the child, who ſhe thought would be regarded as a proof of her guilt.

Let us add a laſt fact ſtill more conſiderable: ſhe not only wiſhed to conceal her ſituation during the continuance of her pregnancy; ſhe even ventured to deny both the pregnancy and the delivery in the face of juſtice. She thought that ſhe ſhould pronounce her own condemnation, if ſhe acknowledged the birth of her ſon.

Such are all the proofs which reſult from the information; proofs ſo conſiderable when they are combined, that even the principles of law and the moſt certain maxims ſeem to become doubtful, when we conſider ſo great a body of unſuſpicious teſtimony concurring to ſupport the preſumption, that the perſon who claims the ſtate of a legitimate child is the fruit of his mother's criminality.

Let us not, however, abandon the authority of the only principles which can aſſure the birth of individuals; and let us not be ſo overcome by this multitude of preſumptions, as to weaken the foundations of civil ſociety.

The arguments are probable, but they are not invincible; and to begin with that which appears the moſt ſpecious; the abſence of the huſband does not appear ſufficient to throw doubt upon the ſtate of the ſon. Two conditions equally eſſential are abſolutely wanting for the production of that effect; the length of its continuance, and the diſtance between the places.

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The abſence of the huſband began in *March*, and ended in *June*. From his departure to the birth of the child there was only a period of about ten months; after his return there was a complete interval of ſeven months; and in each of theſe caſes the laws have decided in favour of the legitimacy of children.

But beſides, who can be ſure, that the *Sieur de Vinantes* was ſo aſſiduous in his ſervice, that he was not abſent from his duty a ſingle day? Who can prove that in ſo ſmall diſtance as twenty leagues he never came to his country houſe; and ſhall the certainty of the ſtate of a child, and the quality of legitimacy, be allowed to depend upon ſuch a fact as this?

But it is ſaid, the wife of the *Sieur de Vinantes* has been condemned, her guilt therefore cannot be called in queſtion.

We have no other anſwer to make to this objection than the law which has been cited to you. *Poteſt et illa adultera eſſe et impubes defunctum patrem habuiſſe.* You cannot involve the ſon in the condemnation which you have pronounced againſt the mother. She may be criminal and he legitimate.

The ſecond fact which may be attended with even more difficulty than the firſt is, the declaration of the mother, her repeated acknowledgments, her denials, and her conduct which ſpeak ſtill more forcibly than her acknowledgments.

To deſtroy this preſumption we ſhall only ſay that juſtice pays no regard to thoſe forced acknowledgments, which the fear of infamy, the deſire of revenge, or the blindneſs of paſſion, may extort from a mother.

Every one knows that guilt is timid, that perſons accuſed frequently deny the moſt indifferent facts; and that the chief of the *Roman* poets formerly applied to an impaſſioned woman the deſcription of *omnia tuta timens.*

But even if we may believe the mother to have been exempted from thoſe emotions which are common with perſons accuſed; what are we to conclude from all theſe circumſtances, except that ſhe may have been in an error reſpecting the commencement of her pregnancy, and have apprehended that her huſband would probably form the ſame judgment with himſelf? But neither her paſſion nor her error can prejudice the ſtate of her ſon; and, beſides, the motive which determined her to conceal her pregnancy is too uncertain, to govern the deciſion upon the condition and fortune of the appellant.

If the *Sieur de Quinquet* took that care of the child which in-

duces a preſumption that he was the real father, it was perhaps a conſequence of the ſame error; the ſecrecy of the baptiſm, the myſtery of the nurture, may have had the ſame foundation; and whatever the motive may have been, the law forbids our pronouncing upon ſuch preſumptions as this againſt the ſtate of a child.

Laſtly, it is of no avail to reſort to the ſuffrage of the father for the deciſion of this conteſt; his teſtimony is deciſive, whenever it is in favour of a child, whoſe quality is uncertain. *L.* 1. § 12. *ff. de agnoſ. lib. Grande præjudicium affert profilio confeſſio patris.* But this powerful prejudice becomes a very feeble preſumption, when the father diſavows his ſon, and eſpecially when it may be preſumed that he wiſhes to avenge upon the ſon the offence of the mother.

We add to all theſe reaſons, a reflection ariſing from the *arrêt* which you have pronounced againſt the mother. The huſband alleged the birth of the appellant as the ſtrongeſt proof of adultery.

The ſame arguments, the ſame witneſſes, the ſame preſumptions, which are employed to day were then before you. In ſeveral inſtances, the court, in pronouncing upon the crime, had declared the child who was the fruit of it to be an adulterine baſtard. Yet in this caſe nothing was pronounced upon the ſubject.

You confirmed then his ſtate by your ſilence, and we could not wiſh for any better guide in the deciſion of the cauſe.

We think therefore that the party of *M. Chretien de Lamoignon* ought to be ſupported in his poſſeſſion of the quality of a legitimate ſon; that the party of *M. Arrault* ought to be enjoined to acknowledge him as his ſon, and to pay for his maintenance.

An *arrêt* conformable to this concluſion was pronounced the 15th of *June*, 1695, by the Firſt Preſident *Harlay*.

In the above pleading we ſee that the law, *Pater eſt is quem nuptiæ demonſtrant*, only eſtabliſhes a preſumption which may be combated by proof; beſides which the only object of the law was to decide, that there is no certain father for a child *vulgo conceptus*; whereas the iſſue of a ſolemn and public marriage has a perſon whom he can call his father: on the other hand, that a child may be legitimate if born of a woman reſiding with her huſband,

huſband, although ſhe may have been guilty of miſconduct. As the deciſion of cauſes of this nature depends upon the application of the principles to the circumſtances, different judgments have been given according to the difference of facts. There are ſome which reject the demands of thoſe who pretend to have been born in wedlock, without having either proofs or poſſeſſion of ſtate. In the preſent caſe the birth of the child was proved, as well as the reſidence of the mother with the huſband; who only alleged an abſence of three months; and the *arrêt* which, in declaring the mother criminal, did not declare the child to be illegitimate, appears to have been founded upon this circumſtance. *Note to the original.*

PLEADING (a).

Pronounced in two Audiences, the laſt on the 10th *of January* 1696.

In the Caſe of the Prince de Conty and the Ducheſs de Nemours.

Upon an appeal from a ſentence of the *Requêtes du Palais*, which ordained a proof, by witneſſes, of the time when the inſanity of the *Abbé d'Orleans* laſt male iſſue of the houſe of *Longueville*, commenced.

I. *Whether the caducity of the inſtitution induces the caducity of an inſtitution, conceived in terms of requeſt and purely* fidei-commiſſary.

II. *Whether a* codicillary *clauſe in this caſe ſupports the* fidei-commiſſary *ſubſtitution.*

III. *Whether the author of this ſubſtitution, having executed a ſecond teſtament, which changed the diſpoſition of the firſt, a donation and ſeveral other acts, and having ſix months afterwards been placed under an interdiction for inſanity, proof by witneſſes could be admitted of the inſanity having commenced at the time of the teſtament.*

THE circumſtances of exterior ſplendour that accompany this cauſe, the greatneſs of the parties who are waiting in ſuſpence for the judgment which you are to pronounce, and every thing which attracts, this day, the attention, the wiſhes, and the concourſe of the public, muſt, (ſuch is the ſeverity of our duty,) be forgotten at the outſet of this diſcourſe.

Whatever reſpect we may have for the parties, we ſhall not heſitate to ſay, that we are no longer here to regard the perſon of a prince, whoſe valour, whoſe virtue, and whoſe royal anceſtry we honour in common with all Europe, nor the inheritreſs of the fortunes of the houſe of *Longueville*, who ſeems to bring here the favour which belongs to a name of ſuch exalted celebrity; and in

(a) No. 37. of the printed Collection.

order to avoid the equally dangerous influence of a prepoſſeſſion, favourable or adverſe to the one party or the other, we can only contemplate them to day, as they are contemplated by juſtice herſelf.

Diveſted in her preſence of theſe exterior advantages, they lay at her feet the ſplendour of their dignity; they ſubmit all their grandeur to the empire of the law, to receive from its oracles the certainty of their deſtiny.

Let us leave to thoſe who have the good fortune of being mere ſpectators of ſo illuſtrious a conteſt, the pleaſure of remarking that a cauſe, private in its nature, appears to have become public; that the intereſt of an individual is regarded as the intereſt of all; and that, whatever variance there may be in opinions, the views and wiſhes upon the ſubject are at leaſt in unity.

As for ourſelves, we will venture to declare, that an intereſt ſtill more great and elevated attaches all our application; it is the intereſt which the public ought to take in the deciſion of a cauſe where the grounds of determination appear to be in conflict with each other; where the intention of a teſtator is combated by an oppoſite intention; where ſanity and incapacity appear to be equally probable; where the favour of the teſtamentary heirs is balanced by that to the heirs by blood; and where we are to ſeek for, to diſcover, and to eſtabliſh the ſolid principles of human certainty, by which we may for ever confirm the real ſtate of thoſe who are gone down to the grave, and aſſure the execution of their ſound intentions.

The fact, which is the foundation of theſe different queſtions, is one of the principal and moſt important parts of this cauſe.

Henry d'Orleans, duke de Longueville, was twice married, and each time he had the honour to renew the ancient alliances of the houſe of *Longueville* with the ſacred blood of our kings.

Madame de Nemours owes her birth to the firſt marriage, and the ſecond was followed by that of two children, the laſt and only hopes of an exalted race, which hitherto had given the ſtate almoſt as many illuſtrious perſons, as the number of ſubjects that it had produced.

Jean Louis Charles d'Orleans, whoſe teſtaments are the ſubject of this diſpute, was the eldeſt. He came into the world the 10th of *January*, 1646; the 12th of *January*, in the year 1671, therefore, was the term of his minority, and almoſt of his civil life, ſince all the parties agree that a few months afterwards he in a manner died both to himſelf and his family, by a madneſs which only terminated with his natural life.

Charles Paris d'Orleans, Comte de Saint Pol, his brother, who was younger by two years, would have come of age in 1673, if a premature death had not ſnatched him away in the flower of his age.

You recollect the different portraits which both parties have drawn of the different characters of theſe two brothers; divided, or rather oppoſed, upon every other fact, they are agreed upon this, and have called upon you on the one ſide and the other to obſerve,

That the *Abbé d'Orleans* had received from nature, inclinations ſo little ſuitable to the grandeur of his birth, that ſhe ſeemed purpoſely to have prepared his family for the misfortune which was to happen in the ſequel:—the weakneſs of his mind correſponded to that of his frame; born to obey, rather than to command, incapable of conceiving views proportionate to the elevation of his condition; an avarice unworthy of his rank, a natural levity which induced him continually to remove from place to place, without any other object than that of change, were the two leading paſſions which appeared during the time that he was in poſſeſſion of his reaſon.

The *Comte de Saint Pol*, on the other hand, truly worthy of the name of *Longueville*, born with all the great qualities which had ſhone forth in the heroes of his race, ſeemed to revive in himſelf the famous *Comte de Dunois*, whoſe memory will laſt as long as the monarchy itſelf.

It ſeems that the *Abbé d'Orleans* had ſeen without any jealouſy the extreme difference of merit between his brother and himſelf, and that he was the firſt who endeavoured to repair by his liberality the injury which nature had done to the *Comte de Saint Pol*, by refuſing him the name and quality of the elder brother.

Scarcely had his age and reaſon rendered him maſter of his liberty, when he wiſhed to make a ſacrifice of it, by engaging in the profeſſion of religion.

He entered, during the life of the duke *de Longueville* his father, into his noviciate with the Jeſuits; and, if he relinquiſhed it after his death, it ſeems that he always retained the deſire of renouncing the engagements of the world, and ſeeking, in the ſtate of a ſimple eccleſiaſtic, a kind of life more conformable to the obſcurity of his inclinations.

His continual journeys, or other reaſons which are unknown to us, ſuſpended for ſome years the execution of his deſign.

Without attempting at preſent to give an exact relation of all his proceedings, it will be ſufficient to remark, that he paſſed near three years, travelling within and without the kingdom, examining

ing himſelf the accounts of his expences, ſigning the orders for payment, and living with a parſimony which we could hardly conceive poſſible in a perſon of his rank, if the accounts which are produced to day were not an indiſputable teſtimony of it.

It was in the courſe of his firſt journies that, at the age of 22, he began to give indications either of his ſlight attachment for temporal dignities, or of his great affection for his brother.

He went with him to *Neufchatel*, and on the 21ſt *March*, 1668, in an aſſembly of his principal officers, he voluntarily renounced the moſt ſplendid of his titles, and deprived himſelf of his quality of *Sovereign Comte* of *Neufchatel* and *Valengin*, in order to confer them on the *Comte de Saint Pol*.

He himſelf explains the motive which engaged him to make this reſignation. The eſteem which he had for the *Comte de Saint Pol*, in whom he obſerved all the grand qualities which could ſuſtain the dignity of his houſe; the affection which he had for his ſubjects at *Neufchatel*, whom he hoped to render happy in giving them a ſovereign, capable of imitating the great examples of his anceſtors, and of ſupporting his ſtate with its original dignity.

It was thus, and almoſt in theſe identical terms, that he declared the reaſons of his choice: he adds, that it was many years ſince he had formed this deſign, to which he had not met with any oppoſition, except in his own family.

The only condition which he attached to his liberality, was a right of reverſion to himſelf, in caſe his brother ſhould die before him without children.

This firſt donation was followed, two days afterwards, by another which can only be conſidered as the continuance and execution of the firſt.

In order to mark in a ſtill ſtronger manner, that he no longer regarded the territory of *Neufchatel* as a property belonging to himſelf, he gave his brother, by way of donation, whatever might be due to him in any reſpect as ſovereign lord of that territory.

And finally, the ſame day, thinking that his liberality was confined in too narrow bounds, if he did not extend it beyond the limits of *Neufchatel*, he made a donation to his brother comprizing generally all his effects, without any reſervation or exception; and as this donation was to have its effect in the kingdom, he expreſsly declares that the motive which determined him to make it, was the deſire of giving his brother more effectual means of rendering ſervice to his king and country, according to his own good intentions and the obligations of his birth.

The conditions upon which this donation was made evince that the

the intention of the donor was to make a kind of teſtament: he ſpeaks of the place of his burial, and gives directions concerning his funeral; he charges his donatory to pay ſeveral annuities to different perſons of his family; finally, he declares that this diſpoſition is his laſt will, that he revokes all other teſtaments which he might already have made; and, in order to aſſure ſtill more ſtrongly the execution of this act, he adds a kind of codicillary clauſe, by which he wills that the preſent donation *cauſa mortis*, ſhall avail by this mode and by every other better form by which it might avail and legally ſubſiſt.

Not content with having rendered his brother maſter of *Neufchatel*, and giving him all his moveable effects; he wiſhed to aſſure to him the title of his heir by a teſtament, clothed with all the ſolemnities of the *Roman* law.

After having, on his return from *Neufchatel*, run through *Burgundy* and *Provence*, he returned to *Lyons*; and arrived there about the 26th of *September*, 1668.

We are ignorant what was the exact time of his continuance there; but we certainly know that it could only be very ſhort, as he had not arrived on the 26th of *September*; and was at *Milan* on the 18th of *October* following.

If we ſubtract the time which was neceſſary for going from *Lyons* to *Milan*, it will be eaſy to conclude that he did not at moſt ſpend at *Lyons* more than eight or ten days.

It was in this interval that the teſtament which is the foundation of the prince *de Conty*'s claim was made: and, as this act is one of the moſt important which we have to examine in the ſequel of the cauſe, ſuffer us to attach ourſelves ſcrupulouſly to an explication of the time, the place, the form in which it was paſſed, and the principal diſpoſitions which it contains.

This teſtament was made the 1ſt of *October*, in the year 1668; ſix months after the donation of *Neufchatel*, and thoſe which accompany it.

It was made at *Lyons*, in the houſe of the prieſts of the oratory.

It is clothed with all the ſolemnities preſcribed in the *Roman* laws, and preſerved by the uſage of thoſe provinces, which follow the rules of the written law.

It is a nuncupative teſtament, that is to ſay, a teſtament dictated by the teſtator, and ſigned by him in the preſence of ſeven witneſſes and a notary.

Of theſe ſeven witneſſes, ſix were prieſts of the oratory; the ſeventh was an eccleſiaſtic, not belonging to that congregation.

In

In point of form there can be no impeachment of ſo ſolemn an act; that is a fact which all the parties equally acknowledge.

If we paſs from the exterior ſolemnity of the act, to the ſubſtance of the diſpoſitions which it contains, we may remark at firſt the preamble, all the terms of which have been taken notice of, in order to throw ſome ſuſpicions of ſuggeſtion upon this firſt teſtament.

It is obſerved that one of the principal reaſons ſtated, as inſpiring the *Abbé* with a deſign of making a teſtament, *is that there may be no proceſs for his ſucceſſion among ſt his relations and friends.*

After having given an account to the public for the reaſons of his conduct, he enters into the detail of his diſpoſitions; and beginning by what relates to his funeral, he forbids all kinds of ceremonies, he will have neither pomp nor funeral oration; indifferent as to the place of his burial, he deſires that his body may be interred in the pariſh of the place where he may happen to die; he regulates the number of maſſes, and the quality of the prayers which he wiſhes to be ſaid for him after his death. He joins to the diſpoſitions concerning his burial, ſome pious legacies: he gives 20,000 livres to the poor of his eſtate, and leaves an annual ſum of ſix hundred livres for a miſſion there every year.

The domeſtics and other perſons who had been long attached to his family, are the third object of his regard; he leaves them life annuities: we ſhall only obſerve one of theſe legacies, it is that of 800 livres a-year to Porquier, and we obſerve it becauſe it has been made uſe of to juſtify his conduct at the time of the laſt teſtament.

Theſe diſpoſitions are followed by two different inſtitutions, the one particular, the other univerſal.

The particular inſtitution is made in favour of *Madame de Longueville* his mother, for the ſum of 30,000 livres; and, in order to ſatisfy another formality of the written law, he inſtitutes each of his relations whoſe omiſſion might prejudice his teſtament for the ſum of 100 livres.

The univerſal inſtitution is compoſed of ſeveral degrees.

We may take notice of four.

The firſt is the inſtitution of his brother. The ſecond comprizes the children of that brother. In the third, *Madame de Longueville* is appointed in default of the two firſt degrees; and laſtly, the teſtator intreats her to diſpoſe of his effects in favour of the *Princes de Conty.*

But as this clauſe makes one of the principal difficulties of the cauſe, and is the foundation of the other queſtions of law, which have

have been brought before you, we think it is our duty to ſtate it fully without changing any of its eſſential terms.

" And as the inſtitution of an heir is the chief and founda-
" tion of every teſtament and laſt will; the teſtator has made
" and inſtituted as his univerſal heir, *Charles Paris d'Orleans,*
" *Comte de Saint Pol,* his younger brother, and after him his
" lawful children, preferring males to females; and in caſe of the
" death of the ſaid *Comte,* before or after the teſtator, without
" children, the teſtator has ſubſtituted his honoured mother,
" humbly intreating her to diſpoſe of the ſaid goods at her death,
" in favour of the *Princes de Conty* his couſins german."

Theſe are the terms in which the inſtitution and ſubſtitutions are conceived; you obſerve the four degrees which we have diſtinguiſhed, the *Comte de Saint Pol,* his children, *Madame de Longueville,* the *Princes de Conty.*

You remark alſo on the one ſide that continuation, that connection of expreſſions, by which, although there are ſeveral inſtitutions and ſubſtitutions comprized in theſe words, they nevertheleſs only compoſe one and the ſame clauſe. An important reflection, from which it is argued that all theſe diſpoſitions, though different from each other in expreſſion, were not ſo in the mind of the teſtator.

But you have remarked at the ſame time on the other ſide, that the teſtator all at once changes his expreſſion with regard to the *Princes de Conty;* and that after having called all the others to the ſucceſſion directly, he only calls them by words which are indirect and uncertain; and it is upon this obſervation that *Madame de Nemours* concludes, that with reſpect to them, the teſtator changed his intention as he changed his expreſſions.

Finally, after having given aſſurance to his teſtament by the inſtitution of an heir, he confirms it by a codicillary clauſe conceived in the moſt extenſive terms, that the ſtyle of a notary could ſuggeſt.

He declares that he wills, " that his teſtament ſhall avail by way of nuncupative teſtament; and if it cannot avail by way of teſtament, it ſhall avail by way of codicil, *donatio cauſâ mortis,* and every other diſpoſition in the nature of a laſt will, by which it may lawfully prevail and beſt ſubſiſt." And after this declaration, he revokes all former teſtaments, and even the donation made at *Neufchatel,* the 23d of *May,* 1668; by which he gave his moveable effects to his brother.

After having explained the form and ſubſtance of this teſtament, we think it material to obſerve that the teſtator cauſed *a copy* of it

to

to be made, which he placed, as it is contended, in the hands of the *Princes de Conty*; it is added that he left with it the project of this ſame teſtament in his own hand writing, in which we may ſtill perceive the plan of the principal diſpoſitions which it contains: this paper, almoſt conſumed by length of time, has been adduced and admitted, in the *Requêtes du Palais*.

It is entirely written in the hand of *Monſieur de Longueville*, who intitled it, *Reſolutions concerning his Will*. One part of the writing is effaced by time. There are beſides two lines effaced with ink, but from what remains it is evident that the teſtament and the project perfectly accord.

We find in it the principal clauſe, that is to ſay, that of the inſtitution and the ſubſtitutions, conceived in ſimple terms, ſuch as *Monſieur de Longueville* might and naturally would be acquainted with; but terms which are energetic, which comprize in ſubſtance every thing, which the notary has merely drawn out at length, and clothed in technical terms. And in this project the *Princes de Conty* are called to the ſucceſſion, in the ſame language of requeſt which appears in the teſtament; the codicillary clauſe is alone wanting in this writing. Immediately after this teſtament, the *Abbé* ſet out from *Lyons*, and arrived at *Milan* on the 15th, and traverſed a part of *Italy*, with as little attention to the preſervation of his dignity in foreign countries as in *France*. It appears that at that time, he even wiſhed his very name to be forgot, as he laid it aſide and aſſumed another belonging to one of his eſtates.

The year 1668 was paſſed in travelling.

The following year is not remarkable in the cauſe, except by a ſingle fact which has been made uſe of as a fixed point, diſſipating every ſuſpicion which might be thrown upon his ſtate, in 1688; and which inconteſtibly eſtabliſhes his ſanity.

He paſſed part of that year at *Rome*, and it was there that he reſolved to execute the deſign, which he had apparently conceived long before, of entering into holy orders.

Madame de Longueville was apprized of this deſign; and whether ſhe was perſuaded by her ſpirit of piety, that the character of her ſon's mind was not ſufficiently elevated to enable him worthily to aſpire to the awful functions of the prieſthood, or whether ſhe had other reaſons which are not explained, it is certain that in the month of *October*, 1669, ſhe ſignified to the archbiſhop of *Paris*, that ſhe formally proteſted againſt all letters demiſſory, which might have been ſurprized from him for the *Abbé*; and, in caſe there was none yet granted, ſhe oppoſed it in his hands for reaſons which ſhe would afterwards explain.

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This oppoſition came too late, the demiſſory was already ſent off; and upon the credit of that act, by virtue of a diſpenſation from the pope, the *Abbé* received in leſs than three weeks all the degrees of holy orders, and was at laſt ordained prieſt in the month of *December*, 1669.

At the age of 24, and inveſted with the ſacerdotal character, he was not yet emancipated; and it was not till the month of *July*, 1670, that the family were aſſembled to give their opinion reſpecting his emancipation, and that of his brother who was then about the age of 22.

The illuſtrious relations with whom they had the honour to be connected, judged them both capable of adminiſtering their revenues, under the authority of *M. Iſſally*, an advocate in the court, who was named their curator.

And the 22d of *July*, 1670, the advice of theſe relations was confirmed by an order of the court.

This order is an inviolable epocha in the cauſe, which the one party and the other equally reſpect.

Thus far the ſanity of the *Abbe d'Orleans* is not leſs evident by the ſuffrage of his family, than by the authority of the court.

But it is inſiſted that nature ſoon took from him that liberty which his family had given him, that ſhe reduced him to the moſt melancholy and ſevere of all ſervitudes. We do not offer at preſent to enter into the examination of this important fact; and if we ſpeak of it, it is only to indicate the fatal moment, when all the facts, which hitherto have appeared ſufficiently certain, begin to be doubtful and obſcure.

And that we may not penetrate into this obſcurity before the proper time, we ſhall confine ourſelves at preſent to a ſimple and curſory explication of thoſe facts, as they are written in the acts which are equally reſorted to by both parties.

The emancipation gave the *Abbé* the free adminiſtration of his revenues, but it could not extend ſo far as to give him the power to alienate his immoveable effects.

Yet hardly any thing elſe was wanting to place him at liberty, with regard to *Madame de Longueville*.

By a tranſaction that paſſed in the year 1664, between *Madame de Longueville*, and the *Duc de Retz* as tutor of her children, all the rights which ſhe could exerciſe againſt them were liquidated and fixed at the ſum of nine hundred and fifty thouſand livres.

She offered to take eſtates in payment, and the minority of her ſons

ſons did not allow them to make this alienation without being authorized, upon a conſultation of their relations.

They were aſſembled the 26th of *Auguſt*, 1670; and unanimouſly approved of a propoſition made to them, for abandoning ſome of the eſtates, in order to extinguiſh a debt, which was equally favourable and legitimate.

The *Abbé* himſelf demanded the confirmation of this opinion; and the court by an order of the 2d of *September*, 1670, permitted him to treat with his mother upon the conditions approved by their relations.

It ſeems that it was firſt intended to execute this order with diſpatch, and we ſee that proper perſons were appointed to value the eſtates, intended to be given to *Madame de Longueville*.

But whether there were found, in the ſequel, ſome unexpected difficulties in making the valuation, or whether it was judged more proper to defer the execution of the plan, until the *Abbé* ſhould attain his age of majority, which would only be five months; it appears that theſe firſt projects remained in ſuſpence until *January*, 1671. If we are to enter into the detail of the conduct of the *Abbé* during this time, that is to ſay, from his emancipation to his majority, it is not uſeleſs to obſerve in the outſet, that when the order permitting him to treat with his mother was obtained, he had already left *Paris* on the 13th of *Auguſt* preceding.

Let us not inquire as yet into the reaſons and motives of this departure, let it be as you pleaſe, an effect of his natural volatility, or a ſage precaution of his family; this is what we are to examine hereafter. It is always a certain fact, that he ſet out from *Paris* on the 13th of *Auguſt*, 1670.

It is in the courſe of this journey, that the greater part of thoſe facts which have been mentioned to you, without being preciſely and formally alleged, are aſſerted to have taken place. It is during that period of time, that he began, as it is maintained, to ſhow the ſad, but infallible preſages of the misfortune which afterwards attended him; or, to ſpeak more correctly, that he is ſtated to have exhibited the too ſenſible proofs of his imbecility.

If we follow him exactly in the courſe of his journies, we ſee him firſt go from *Paris* to *Orleans*, accompanied by ſome gentlemen, and a ſmall number of domeſtics, he ſets out in the *Orleans* coach, which he had taken entirely for himſelf and his attendants.

He arrives at *Orleans* on the 30th of *Auguſt*, and ſtays there till the

the 9th of *September*, in a common inn; where his own expences do not amount to forty ſols a day.

The 9th of *September*, he goes by water to *Tours*, from *Tours* to *Angers*, from *Angers* to *Nantes*; and in all theſe different cities, his expence is upon the ſame ſcale as at *Orleans*.

The 14th of *November*, after having employed more than two months in running through the provinces which are ſituate along the coaſt of the *Loire*, it appears that he took the reſolution of returning to *Paris*.

He engages the coach at *Angers*, and follows the common road till he comes within one day's journey of *Paris*, that is to *Gué de Lore*, a village ſituate half a *day's journey* from *Chartres*.

He there meets a footman of the *Comte de St. Pol*, and immediately takes the reſolution of quitting the *Angers* coach, and returning to *Orleans*.

What was the cauſe of this ſudden change? Shall we attribute it to a ſudden impulſe of which nobody could prevent the effect? Shall we rather ſuppoſe that the news which he received from *Paris* induced him to take ſo unexpected a reſolution? This is a point upon which we are abſolutely ignorant, and which we can only diſcover by conjectures.

Let us follow the *Abbé* in this ſudden return, and ſee what were his proceedings.

He hires three horſes and three chairs, and is followed only by two attendants; he arrives the ſecond day, by a croſs road, at *Orleans*.

The reſt of his domeſtics continue their route to *Paris*, and do not return to him till a long time after.

We ſee by the accounts of his expence, that he remained from the 20th of *November*, to the 29th of *December*, that is for 39 days, in a common inn at *Orleans*, at 40 ſols a day.

Dalmont his ecuyer, and his other officers, came there towards the end of *December*; *Dalmont* quits him on the 29th to return to *Paris*, and the ſame day the *Abbé* embarks a ſecond time upon the *Loire*, to ſee once more the city of *Tours*, and at laſt he reſumes the route for *Paris*; and, more conſtant this ſecond time than the firſt, he arrives there the 15th of *January*, 1671; being only three days after attaining his majority.

He ſtaid there from the 15th of *January*, to the 6th of *March* following, that is, near two months; and it is in that interval of time, that he executed all the acts which have been ſtated to you ſo much at length.

The firſt act is of the 16th of *January*, that is to ſay, the day after

after his arrival, the laſt is of the third of *March*, that is, two days before his departure; the firſt act can only be conſidered as an execution of what had been propoſed in *Auguſt* preceding for the payment of *Madame de Longueville*.

His majority having taken place in this interval abridged the formalities, which were neceſſary to alienate the property of a minor.

It is no longer as acting under the authority of a conſultation of relations, that he treats with *Madame de Longueville*; his majority put him in poſſeſſion of perfect liberty; he not only treats for himſelf but alſo for his brother; he acts and ſtipulates for him, and promiſes to procure his ratification as ſoon as he attains the proper age.

Diſpenſed by his majority from going through the delays of a valuation, inſtructed himſelf as to the value of the eſtates, he fixes a price in concert with his mother; and becauſe this price was not equal to nine hundred and fifty thouſand livres, he engages to pay the remainder, and at the time of the contract he promiſes to give forty thouſand livres to *Madame de Longueville*.

This act was executed the day after his arrival in the forenoon.

Scarcely was it ſigned, when he began to execute it, by borrowing from *M. Voiſin* the ſum of forty thouſand livres upon three contracts, for annuities executed the twentieth of *January*, by the *Abbé* as well in his own name as in that of his brother.

The thirty-firſt of *January*, he executed another inſtrument, equally important with thoſe already mentioned, as to the inferences which have been drawn from it.

Every thing in this inſtrument is conſiderable, the parties, the place, the notary, the time, the execution: thoſe who executed are on the one ſide, the *Prince de Condé*, then *Duc d'Anguien*, as bearing the ſpecial procuration of the *Prince de Condé*, his father, and on the other the *Abbé d'Orleans*, who engages as well for himſelf as for his brother.

The place where it was executed is the *Hotel de Condé*, and the notary who keeps the minute of it, is the one employed by the family of *Longueville*.

The time is the thirty-firſt of *January*; and the procuration tranſcribed at the foot of the project of this contract, in which no alteration is made, is dated the fifteenth of *January*, the day of the *Abbé's* arrival.

Finally, the effect and execution of this act are to give to the *Abbé* and his brother, in payment of intereſt for the portion of *Madame de Longueville*, the barony of *Meſle*, for the ſum of one

ſhould be aſſured by the preſence and ſignature of the *Abbé d'Orleans*.

Such are all the acts executed by the *Abbé d'Orleans*, during his ſtay at *Paris*; two days after the laſt of them he ſet out in the coach for *Lyons*, with the ſame domeſtics who accompanied him in his former journies.

It appears that from *Lyons*, he went firſt to *Provence*, and afterwards to *Straſburgh*, and that he took the waters in *Germany*, about the month of *September*: this is all that we know of his journies from the ſixth of *March*, 1671.

During all this time he wrote ſeveral letters, he audited his accounts, ſigned releaſes, bills of exchange, and directions which were neceſſary for the expence of his family. In general we ſee no veſtige of that neceſſary counſel, which it is inſiſted that his family had given him; there are only two or three pieces in which it is intimated, that he took the counſel and advice of the *Sieur Dalmont*.

Thus paſſed about ſix months from his leaving *Paris*, and without examining what was then his real ſituation, it is certain that in the month of *October* it was thought that there was no other way of the preventing the noiſe which his inſanity, whether ancient or recent, would make in the world than by ſhutting him up in an *Abbey*.

They at firſt choſe *Hauteſelle*, where he was conducted by the *Sieur de Morcaut*, by virtue of a letter *de cachet* from the king; they removed him afterwards to that of *Chezal Benoit in Bery*, and afterwards to that in the dioceſe of *Lizieux*, where he continued during the remainder of his life.

Although he had entirely loſt his liberty, they heſitated in publicly depriving him of his civil life by a juridical interdiction.

They even deferred it until the year 1672, in order to deliberate upon the conduct which ſhould be obſerved in the adminiſtration of his property.

It was on the nineteenth of *January*, 1672, that a ſmall number of his illuſtrious relations aſſembled, to give their opinion upon the condition of the *Abbé d'Orleans*.

Madame de Longueville, the *Prince de Condé*, the *Duc de Anguien*, the *Princeſs de Conty*, the *Comte de St. Pol*, were the only relations who attended at this aſſembly.

The reſult of their deliberation was, that as long as the affairs of the *Abbé* would permit, they ſhould make uſe of the procurations which he had given in *February*, 1671.

That *Madame de Longueville* ſhould continue to preſent to the benefices and offices which might become vacant, by virtue of

of the procuration given to her; that *Porquier* ſhould adminiſter the effects and revenues as he had hitherto done, conformably to the procuration of the twenty-ſixth of *February*, 1671.

At length in the month of *March*, 1672, the malady appeared abſolutely incurable, and *Madame de Longueville* had recourſe to the ſad, but neceſſary remedy of an interdiction.

She ſtated in the memorial which ſhe preſented to the king, that the *Abbé d'Orleans*, her ſon, *ſeven or eight months after his tutelage was finiſhed, and he had attained his majority, having undertaken divers journies in foreign countries, by reaſon of the fatigue which he had undergone, and the kind of life which he led, was rendered incapable of managing his affairs.*

The whole family were aſſembled, and gave their opinion in favour of the interdiction; and the greater part, of them, in order to ſhew the nature of the malady of the *Abbé d'Orleans*, called it *his preſent infirmity*, and ſpeak of the *actions which he had committed in Germany*; from which expreſſions it is ſuppoſed that great aſſiſtances may be derived in fixing the commencement of the inſanity.

Before pronouncing the interdiction, the king commiſſioned *Monſieur Tubeuf, Maitre des Requêtes*, to interrogate the *Abbé d'Orleans*, and to receive the depoſitions of the domeſtics employed about his perſon.

Neither the interrogatory, nor the depoſitions of the witneſſes are now adduced; but it is highly probable that the *Abbé* pronounced his own condemnation by his anſwers, and that the witneſſes confirmed the proof of his inſanity, as the king a ſhort time afterwards gave an order for his interdiction.

Madame de Longueville was appointed curatrix, and the letters patent giving her that character were regiſtered in this court.

Such was the courſe and termination of the rational life of the *Abbé d'Orleans*, in which, as has been already obſerved, we may diſtinguiſh two periods.

The one of undiſputed ſanity, during which he made the donations of *Neufchatel*, and the teſtament of which the *Prince de Conty* demands the execution; and this firſt period finiſhed about the month of *Auguſt*, 1670, ſhortly after his emancipation.

The ſecond, doubtful, obſcure, full of darkneſs and uncertainty, in which he made the donations, and the teſtament relied upon by *Madame de Nemours*, as defeating that of 1668, and this latter period commences with his emancipation, and terminates about the month of *October*, 1671.

It ſeems, that after having followed him to that fatal moment, in which he entirely loſt the life of a reaſonable being, we may paſs at once to the time when he loſt the life of nature, ſince his con-

dition was afterwards no more than a protracted death; but as the parties contend that they can derive an advantage from ſome acts which took place in the family after his interdiction, it may be neceſſary ſhortly to ſtate them, and thereby terminate the recital of the principal facts of this cauſe.

The *Comte de St. Pol* only ſurvived a ſhort time the interdiction of the *Abbé d'Orleans*, and the houſe of *Longueville* received in the ſame year two mortal blows. The firſt of which deprived the *Abbé d'Orleans* of his reaſon; and the other, the *Comte de St. Pol* of his life.

He was killed at the famous paſſage of the *Rhine*; and if *France* beheld on this occaſion the greatneſs of his valour, ſhe only beheld it to augment the grief which ſhe experienced at his loſs.

The right of reverſion which the *Abbé d'Orleans* had always retained in the donation which he made to his brother, would take effect by his death, and reſtore to the *Abbé* the large property of which he had diveſted himſelf in favour of his brother.

The family aſſembled to deliberate on the manner in which this right of reverſion ſhould be exerciſed, in the name of the *Abbé d'Orleans*.

They conſidered that although this condition was impoſed on the donatory, in the donations of the twenty-third of *February*, 1671, he was notwithſtanding at liberty to engage and hypothecate the property that was ſubject to the right of reverſion; and the family thought that, according to this clauſe, they ought to begin by paying the debts contracted by the *Comte de St. Pol*.

They gave a ſtill more extenſive interpretation to this clauſe, and decided that it was ſufficient in itſelf to ſupport a legacy of five hundred thouſand livres, which the *Comte de St. Pol* had given in favour of the *Chevalier de Longueville*; and all the relations agreed that this legacy ſhould be paid out of the effects, comprized in the donation of the twenty-third of *February*, 1671; this opinion was confirmed by an order of the court.

Madame de Longueville rendered fealty and homage to the king in her quality of curatrix, for the property comprized in the donation.

She obtained a gift of the ſeignorial rights, which was regiſtered in the chamber *des comtes*.

From that time ſhe continued to exerciſe the functions of curatrix until her death, which took place in the year 1679. After her deceaſe, the charge was at firſt divided between the *Prince de Condé* and *Madame de Nemours*, and afterwards was exerciſed ſolely by the *Prince de Condé*.

All

All the accounts of the curatorſhip were rendered to him, and amongſt theſe the ordinances, the bills of exchange, and the allowances of accounts ſigned by the *Abbé d'Orleans*, in the ſecond period; that is to ſay, in the time which we have called a period of darkneſs and uncertainty, are adduced as pieces free from ſuſpicion and as approved titles between the parties.

The *Abbé d'Orleans* died on the fourth of *February*, 1694, at the age of 48; and with him was extinguiſhed for ever the race of the *Ducs de Longueville*. A race happy in its origin and progreſs, by the ſplendid actions of the illuſtrious perſons whom it produced; unfortunate in its termination, whether by the premature death of the *Comte de St. Pol*, or by the ſtill more melancholy and deplorable life of the *Abbé d'Orleans*.

Fourteen days elapſed after his deceaſe, without any other teſtament appearing than that which favoured the pretenſions of the prince *de Conty*; at length on the eighteenth of *February*, the widow of *Porquier* brought to the *Lieutenant civil* two ſealed pacquets, the one ſealed with the arms of the houſe of *Longueville*, the other with the arms of *Monſieur Porquier*; on the firſt was written, *Teſtament of the Abbé d'Orleans*; on the ſecond, *Demiſſion du gouvernement de Normandie, &c. des places de Caen, Dieppe, Pont-de-l'Arche, & Bailliage de Caen.*

Madame Porquier declared that both the inſcriptions were the hand-writing of her deceaſed huſband; ſhe added, that neither of theſe pacquets had been out of her hands ſince his death, and required them to be opened.

The lieutenant directed the parties intereſted to be cited, and on the ſame day, in the preſence of the counſel of *Madame de Nemours*, the two pacquets were opened; in the firſt was found the teſtament of the twenty-ſixth of *February*, 1671, accompanied by two looſe papers, one of which appears written in the hand of the *Abbé d'Orleans*, and has been recognized by the *Requêtes du Palais*; it contains eighteen names, to each of which there is a line drawn to the ſum which correſponds with it; and it appears that this is a memorandum of legacies, which the writer intended to give to ſome perſons of his houſehold.

The other paper is in the hand-writing of *Porquier*, who has entitled it, *project to a codicil which the Abbé d'Orleans wiſhes to make in confirmation of his teſtament.*

At the end of the laſt line are theſe words, in the hand-writing of the *Abbé d'Orleans*: To *Dalmont*, the carriage and its appurtenances.

The ſecond packet was opened on the ſame day, and contained

the five appointments of the *Abbé d'Orleans*, ſigned on the twenty-ſixth of *February*, 1671.

The production of this teſtament did not prevent the *Prince de Conty* requiring the execution of the firſt; he appeared on the fifth of *March*, 1694, before the *Requêtes du Palais*, and demanded, as teſtamentary heir, to be confirmed in the poſſeſſion of all the effects, of which the teſtator had power to diſpoſe; and at the ſame time he commenced the ſame action in a different character, by requiring the deliverance of the univerſal legacy, as he called the diſpoſition of the *Abbé d'Orleans* giving him the ſucceſſion.

Madame de Nemours, in her defence againſt this demand, declared at firſt, that ſhe did not admit the juriſdiction of the court; nor that of the other judges of the realm ſo far as relates to *Neufchatel*; and with reſpect to the other property, ſhe inſiſted that the teſtament upon which the title of the prince *de Conty* was founded, was void, and beſides that it was revoked by that of the twenty-ſixth of *February*, 1671.

The *Prince de Conty* relied upon arguments of law in oppoſition to the firſt defence; but he was obliged to borrow his arguments in oppoſition to the latter, from the allegation of facts; and being unable to contend that a firſt teſtament is not legally revoked by a ſubſequent one, he is reduced to contend that the teſtator was deprived of the uſe of his reaſon, and notoriouſly in a ſtate of inſanity for ſix months, and more, before the teſtament of 1671.

He has alleged this fact by a preciſe declaration; he requires to be admitted to the proof of it; the ſentence has given him that permiſſion. *Madame de Nemours* has preferred an appeal, and requeſts the court to diſmiſs the *Prince de Conty* from his demand, this is the point to which the whole proceedings are reduced.

Such are all the circumſtances of fact; ſuch is the nature of the acts which have been ſtated to you. We have felt it a duty, in a caſe which is no leſs ſplendid than important, not to omit any of the facts that have been propoſed, either by the one ſide or the other, however trifling and inſignificant ſome of them may appear; and we alſo conceive it to be our duty, to lay before you with the ſame exactneſs the arguments of the reſpective parties.

[*The above extract extends from* p. 249. *to* 274. *The arguments of the reſpective parties are next detailed at length, extending to* p. 302. *The pleading then continues as follows.*]

Such, ſirs, is the real ſtate of the conteſt, upon which you are to pronounce.

We

We have endeavoured to place before your view, the principal circumſtances of fact, and the eſſential points, which render the deciſion of this cauſe obſcure, uncertain, and difficult. We ſhall endeavour to-morrow to diſcover the real preſumptions of the intention of the teſtator, in the firſt period; and of his ſanity or inſanity, in the ſecond. Theſe are the two eſſential points, to which this whole conteſt is reduced.

SECOND

SECOND AUDIENCE.

After having ſtated to you in the laſt audience, the eſſential circumſtances of fact, and the principal points of argument inſiſted upon by the reſpective parties, we cannot without apprehenſion behold the moment approach, in which we ſhall be obliged to lay before you our own ſentiments upon an affair of ſuch great importance.

Extended as it is, it appeared eaſy to ſtate, when we had only then to place in the balance, the arguments of the one party and the other; and not to decide upon their force and efficacy.

We had then only to oppoſe one teſtament to another teſtament, to place one ſet of laws in conflict with another, to deſtroy facts by facts; in a word, it was ſufficient to render the cauſe doubtful; and it ſeems that to-day we ſhall be obliged to make it appear as clear and as eaſy to decide, as it was yeſterday obſcure and uncertain.

Happy in this ſtate, if the obligations of our function would permit us to remain in doubt, and after having repreſented to you the reaſons adduced by the reſpective parties, we might be allowed, with the public, to wait for your deciſion, without being obliged in ſome degree to anticipate it; and to walk before the light which we ſhould look to, as our guide.

But ſince the law of our duty is ſo far from permitting us to remain in ſilence upon this occaſion, that it impoſes upon us the honourable neceſſity of addreſſing you, in the name of the public, whoſe intereſts are repoſed in our hands; after having ſatisfied you, that if we dare not hope to fulfil the whole extent of our miniſtry, we have at leaſt ſufficient knowledge to feel and tremble at the weight of it, we ſhall no longer defer the explication of what we conſider as the real ſtate of the cauſe.

You have to pronounce upon an appeal from the *Requêtes du Palais*, which permits the *Prince de Conty* to prove by witneſſes, that the *Abbé d'Orleans* was in a ſtate of inſanity, ſix months and more, before the making of his teſtament.

Madame de Nemours contends that there is at preſent ſufficient room to invalidate the ſentence, and to diſmiſs the *Prince de Conty* from the principal demand, which is the ſubject in diſpute.

Although the ſentence is in appearance only interlocutory; it

it is nevertheleſs certain that it decides a great part of the principal queſtions of this cauſe; to be convinced of which it is ſufficient to conſider that the defence of *Madame de Nemours* is compoſed of two different parts: ſhe contends firſt, that the *Prince de Conty* has no title at all; and ſecondly, that even ſuppoſing he had one, it was revoked by a ſubſequent teſtament, which cannot be impeached by the teſtimony of witneſſes.

If the firſt defence of *Madame de Nemours* is juſt and legitimate, if ſhe can prove that the teſtament, from which the *Prince de Conty* derives his whole title, is a void and a uſeleſs diſpoſition, the ſecond defence becomes ſuperfluous; and if it was once decided that the *Prince de Conty* had no title, you may ſee what would be the neceſſary conſequence. If he has no title, he has no quality; and if no quality, no action; and if he has neither action nor intereſt in the cauſe, why ſhould he be admitted to prove a fact which to him would be abſolutely indifferent; ſince even ſuppoſing the inſanity to be certain, it would be *Madame de Nemours* who would take advantage of it, and it would only ſhew that the *Abbé* had died without a teſtament.

But, on the contrary, when we examine this revocation, when the *Prince de Conty* is admitted to prove, that it was made by a perſon in a ſtate of imbecility, it is implied that he has a ſolid intereſt, a legitimate action, a certain quality, a ſubſiſting title; and this is what the *Requêtes du Palais* have done. It is true they have not pronounced expreſsly on the quality of the *Prince de Conty*, they have not formally decided that the firſt teſtament was not an invalid title, but they have decided it tacitly by receiving his demand, which could have no other ſolid foundation; and it is thus that the court frequently decides upon bars or preſcriptions oppoſed by either of the parties; by admitting the action which is contended to be extinguiſhed or preſcribed, it diſallows the bar or preſcription; and this tacit judgment is not leſs ſtrong or leſs deciſive, than if it had been expreſsly and formally pronounced.

We may then conclude from theſe reflections, that the ſentence ſhould be conſidered not as a mere preparatory judgment, which leaves the rights and arguments of the parties entire; but as a ſentence of adjudication upon the firſt queſtion of the cauſe, that is to ſay, the ſolidity of the title, and which pronounces an interlocutory upon the ſecond queſtion, with reſpect to the revocation of the ſame title.

The appeal from this ſentence then brings before you the ground and ſubſtance of the conteſt, and ſuch is the condition of the parties, that if you reverſe the ſentence, you pronounce at the ſame

ſame time a definitive judgment upon the very foundation of the diſpute; and if, on the other hand, you confirm it, you leave the latter part of the cauſe in ſuſpenſe, until after the depoſition of witneſſes ſhall have *enlightened the religion of juſtice* (*a*). Thus the advantages of the parties are ſo unequal upon this occaſion, that the one may abſolutely gain the cauſe and cannot entirely loſe it; whilſt the other may wholly loſe, but cannot gain it.

After having ſtated the true deciſion of the ſentence, which does not appear to be ſo indifferent as has been repreſented, we ſhall follow the natural order which the two principal queſtions of the cauſe preſent to the mind, and examine in the two parts of this diſcourſe, the two teſtaments which are the ſubject of it. Has the firſt teſtament become void? Was the ſecond capable of revoking it? To theſe two points the whole conteſt is reduced.

To diſcuſs with ſome degree of order the firſt queſtion; that is to ſay, the invalidity of the diſpoſition, we ſhall conſider it under the two different aſpects, in which it has been preſented to you by the reſpective parties.

We ſhall examine firſt, the *fidei-commiſſary* diſpoſition itſelf, and as diſtinct from the reſt of the teſtament; we ſhall endeavour to penetrate into the mind of the teſtator, to ſound the depths of his intention, and ſhall not conſider it ſufficient to have diſcovered it, unleſs it appear conformable to the maxims of law, and the inviolable rules of *Roman* juriſprudence.

We ſhall afterwards conſider it as connected with the codicillary clauſe, of which we ſhall endeavour briefly to explain the origin, the nature, and the effects.

But without dwelling longer upon the plan and deciſion of this cauſe, let us proceed to the examination of the diſpoſition conſidered in itſelf, and independent of the other clauſes of the teſtament; and as the *Roman* juriſts themſelves acknowledge that there is nothing more abſtruſe or ſubtle in the whole ſyſtem of law, than the queſtions which regard the nature and force of ſubſtitutions, you will permit us for the purpoſe of giving as clear an explanation of them, as the extenſive nature of the ſubject will admit, to premiſe ſome general principles, from which we may collect the kind and quality of the ſubſtitution, upon which you are to pronounce.

By a juſt and ſolemn law all ſucceſſions devolved upon the heirs by blood; and the founders of the *Roman* juriſprudence were of opinion, that to deprive them of it, it was neceſſary to make a law not leſs juſt or ſolemn than the firſt; and becauſe it would have been equally abſurd and impoſſible to make one general law derogating from

(*a*) *Eclairir la religion de la juſtice* is a very uſual expreſſion in theſe pleadings.

this

this natural law in favour of the heirs by blood, they gave to every individual once in his life the authority of a legiſlator; but at the ſame time that they inveſted him with this character, they impoſed upon him the neceſſity of propounding his teſtament; not as a domeſtic act, but as an authentic and ſolemn law. The whole people were witneſſes to theſe private laws, in the ſame manner as to the laws which regarded the intereſts of the public. This was not all, the teſtament was not only a public law by its exterior ſolemnities, it was ſo likewiſe by the forms in which it was neceſſary to be expreſſed. The teſtator who dictated an inviolable law to his family, was bound to ſpeak in the ſame manner as the legiſlator who propoſed a law to the whole *Roman* people, and hence aroſe that rigorous neceſſity, which was only abrogated by the emperor *Conſtantine*, of uſing in the inſtitution of heirs, and even in legacies, words conſecrated to the laws, and which the juriſts call direct terms, terms which are imperative and ſuited to the majeſty and power of a legiſlator.

The premature death of the inſtituted heirs, or their refuſal to accept the quality of heir, frequently eluded the execution of this law. It was to remedy this inconvenience that they invented the uſe of direct and vulgar ſubſtitutions, in order to ſupport, by a long ſucceſſion of heirs, the execution of the intention of the teſtator. Nobody is ignorant of the nature of theſe ſubſtitutions. They were not, properly ſpeaking, any thing elſe than a ſecond inſtitution, or, if you pleaſe, the inſtitution of a ſecond or third heir, in caſe the firſt did not take the property of the teſtator, whether for want of power or inclination.

To this mode, which was the only one permitted until the end of the republic, a ſecond was added in the time of the earlier emperors. Teſtators who had hitherto ſpoken only in the language of command, began to make uſe of intreaties, by which they requeſted the inſtituted heirs to render their ſucceſſion, or a part of their effects, to ſuch perſon as they thought proper to appoint.

The law which had not hitherto authorized this diſpoſition, did not at firſt impoſe any neceſſity of accompliſhing it. As decency, good faith, and natural equity were the only foundation of it, they alſo formed the only obligations which engaged the heir to execute it; and if he betrayed the laſt wiſhes of the teſtator, he diſhonoured himſelf, without loſing the ſucceſſion.

Auguſtus firſt avenged the teſtator againſt this perfidy. He made that a matter of inviolable neceſſity, which in its principle was only an engagement of honour; and *fidei-commiſſa* from thenceforth became as frequent as legacies and other direct diſpoſitions.

If

If the terms of requeſt in which they were conceived were leſs ſolemn, they were more efficacious than the direct terms which formed the eſſence of a teſtament; they might be addreſſed not only to the inſtituted heirs when there was a teſtament, but alſo to the legitimate heirs, when there was not. The favour ſhewn to the intention was ſo great in this kind of diſpoſition, that they ſeemed to have been apprehenſive of weakening it, if they had made the execution of it depend upon the leaſt ſolemnity.

The uſe of *fidei-commiſſa* induced the juriſts to diſtinguiſh two kinds of ſubſtitutions, for we do not ſpeak here of pupillary ſubſtitutions, which have no application to the preſent cauſe.

The firſt kind of ſubſtitution was that which they called direct and vulgar, on account of the uſe of it being common, and permitted to all teſtators, and with reſpect to all kinds of heirs.

The ſecond is that which we have called a *fidei-commiſſary* ſubſtitution; but which the juriſts almoſt always expreſs by the ſingle term of *fidei-commiſſa*.

Here it will not be immaterial to make a pauſe, in order exactly to compare theſe two kinds of ſubſtitutions; their different characters are abſolutely eſſential to the deciſion of this cauſe.

The vulgar ſubſtitution is, as we have already obſerved, nothing elſe than a real inſtitution of an heir. *Secunda hæredis inſtitutio*, is the expreſſion of all the juriſts; a ſecond inſtitution, which does not require leſs ſolemnity than the firſt, and which does not give leſs right in reſpect of the entire ſucceſſion. The one is pure and ſimple; the other is conditional, and can only have its effect on failure of the inſtitution; hence it follows, that as often as this eſſential condition is wanting, that is to ſay, wherever the inſtituted heir takes the ſucceſſion, the vulgar ſubſtitution muſt fail; *adità hæreditate evaneſcit*, is the expreſſion of all the laws; and it would be a paradox in juriſprudence to aſſert in general, that the ſucceſſion can be taken both by the inſtituted heir and the party claiming by way of vulgar ſubſtitution.

Thus this inſtitution has, as it were, a double character.

As an inſtitution, it ought to be inveſted with all the ſolemnities which the civil law has eſtabliſhed for the validity of teſtaments.

As a ſecond inſtitution, it can never have effect, except where the party inſtituted in the firſt inſtance does not become actually the heir; an eſſential condition to which the fate of a vulgar ſubſtitution is inſeparably attached.

A *fidei-commiſſum* has two characters directly oppoſite to thoſe which entirely conſtitute the eſſence of a vulgar ſubſtitution.

Firſt, it may be made by any kind of expreſſions.

Every thing which explains, or rather, every thing which induces

duces a preſumption of the intention of the teſtator, is ſufficient to ſupport this kind of ſubſtitution.

But what characterizes it ſtill more particularly, and manifeſts how entirely its nature is oppoſite to that of a vulgar ſubſtitution, is, that whereas the one is irretrievably extinguiſhed, as ſoon as the firſt heir has taken the effects, the other, on the contrary, only derives its operation from his actually taking them.

They are then made upon two conditions directly oppoſite.

The one ſuppoſes that there is no heir, the other on the contrary ſuppoſes that there is one.

The exiſtence of the inſtituted heir annihilates the vulgar ſubſtitution; the exiſtence of the inſtituted heir cauſes the *fidei-commiſſary* ſubſtitution to ſubſiſt. The one diſappears the inſtant the ſucceſſion is acquired; the other, on the contrary, derives its force from the ſucceſſion being actually taken. What cauſes the ceſſation of the one is the conſervation of the other; and what is an eſſential defect in a vulgar ſubſtitution is a neceſſary condition for the execution of a *fidei-commiſſary* one.

Let us then compare the clauſe in the teſtament of the *Abbé d'Orleans* with theſe clear and certain notions of the nature of ſubſtitutions.

But to do this the more eaſily, let us ſtate the very terms of the clauſe, and endeavour to diſcover their real meaning.

The inſtitution of an heir, being the foundation of every teſtament and declaration of laſt will, he has made, and inſtituted as his univerſal heir Charles-Paris d'Orleans, Comte de Saint Pol his younger brother, and after him his natural and legitimate children, preferring males to females, and in caſe of the death of the ſaid Comte de Saint Pol, before or after the teſtator, without natural and legitimate children, then the teſtator has ſubſtituted, both vulgarly and by way of fidei-commiſſion, his honoured mother, humbly requeſting her to diſpoſe of the ſaid property at her death in favour of the Princes de Conty, his couſins german (a).

You ſee, ſirs, that the intention of the teſtator was to make four different degrees of heirs, or rather of ſucceſſors.

He names, firſt, the *Comte de Saint Pol* as his heir: here is the firſt degree of inſtitution, and he charges him with a ſubſtitution

(a) Etant l'inſtitution d'héritier le chef et fondement de tout teſtament et ordonnance de dernier volonté, a fait et inſtitué ſon héritier univerſel Charles-Paris d'Orléans, Comte de Saint Pol, ſon frere puiné, et après lui ſes enfants naturels et légitimes, preferant les mâles aux femelles; et venant le dit ſeigneur Comte de Saint Pol, à mourir avant ou après le dit ſeigneur teſtateur, ſans enfants naturels et legitimes: aux dits cas et chacun d'eux le dit ſeigneur teſtateur a ſubſtitué et ſubſtitue vulgairement, par fidei commis, la dite dame Anne Geneviève de Bourbon ſa tres honorée mere; la ſuppliant tres-humblement de diſpoſer des dits biens; elle venant a mourir, en faveur de M. M. les Princes de Conty ſes couſins germains.

in favour of his children; but as that event has not taken place, we may paſs over the ſecond degree, and proceed immediately to the third, which is that of *Madame de Longueville.*

How is ſhe ſubſtituted to the *Comte de Saint Pol?* The intention of the teſtator cannot be doubted. He declares himſelf, that he intends that ſhe ſhall be ſubſtituted both vulgarly and by way of *fidei-commiſſion.* Let us develope theſe expreſſions, and ſubſtitute the thing for the terms uſed to ſignify it. What was the intention of the *Abbé d'Orleans*, when he ſaid he ſubſtituted her vulgarly and by way of *fidei-commiſſion?* Let us not ſeek for the explication of the clauſe elſewhere than in the clauſe itſelf. He has marked the caſe in which the vulgar ſubſtitution might take place, and alſo the caſe in which the *fidei-commiſſary* ſubſtitution might have its effect.

And in caſe of the death of the Comte de Saint Pol before the teſtator, here is the caſe of the vulgar ſubſtitution, *ſi prior hæres, hæres non erit*, or, *after the teſtator without children*, here is the caſe of the *fidei-commiſſary* ſubſtitution, that is to ſay, that if the *Comte de Saint Pol* cannot be his heir, *Madame de Longueville* ſhall; and if, on the other hand, the *Comte de Saint Pol*, after having become his heir, ſhould die without children, he ſhall render the effects of the teſtator to *Madame de Longueville* by reaſon of the *fidei-commiſſary* diſpoſition.

The laſt degree of ſubſtitution which compriſes the *Princes de Conty*, is not more difficult to explain than the two preceding; it is ſufficient to read the terms in which it is conceived, to diſcover that it is no more than a ſimple *fidei-commiſſion.*

Requeſting her (*la ſuppliant*), &c.

All the terms of this clauſe evidently ſhew that the teſtator intended only to make a *fidei-commiſſary* ſubſtitution.

1ſt, We ſee the terms of requeſt, which are conſecrated by law to the uſe of *fidei-commiſſary* diſpoſitions, terms which can never accord with a vulgar ſubſtitution, which, as we have ſaid, is only a ſecond inſtitution equally ſolemn with the firſt, and conſequently cannot be made by expreſſions which are oblique, precarious, and indirect, ſuch as thoſe made uſe of by the *Abbé d'Orleans.*

2d. We obſerve that the teſtator has expreſſed the caſe in which it was to take effect, and that is only and preciſely the caſe of a *fidei-commiſſary* ſubſtitution.

Let us here reſume the terms of the teſtament, *requeſting her* (*la ſuppliant*), &c. *upon her death* (*elle vivant à mourir*), &c.

It is then only at the moment of her death that the teſtator charges her with rendering the effects to the *Princes de Conty.* He ſuppoſes then that ſhe will have taken the ſucceſſion during her life. Now, as we have already obſerved, this is a caſe directly

oppoſite to that of a vulgar ſubſtitution, which on the contrary ſuppoſes that the ſucceſſion will never be taken by the firſt heir.

In a word, the terms of this *fidei-commiſſion*, are the ſame as thoſe of the law, *Epiſtolam*, 75. *S. Mulier*, in the digeſt, *ad ſenatus-conſult. Trebell.* which the juriſt calls the words of a *fidei-commiſſary* diſpoſition. *Fidei-commiſit in hæc verba; rogo te ut id quod ad te ex bonis meis pervenerit, facias pervenire ad filium tuum.*

If it is ſaid the teſtator has only changed his expreſſion, out of reſpect to his mother: in the firſt place it may be anſwered, that this reſpect did not prevent his ſubſtituting at all events, the *Princes de Conty* to his mother. Or where indeed is the want of reſpect? As a ſon he owed every thing to his mother. The law of nature would not permit him to have any other ſentiments. As a teſtator he owes her nothing. The civil law ſubjects every thing to his diſpoſition. His liberality which was purely gratuitous, with regard to *Madame de Longueville*, had no other rules than his inclination: and who can imagine that *Madame de Longueville*, would have been offended at finding herſelf obliged at all events, to leave the property of her ſon to the *Princes de Conty*, that is, to her natural heirs, to thoſe whom nature, the law, their rank and their merit, would induce her to wiſh for her ſucceſſors?

But beſides, we can only know his thoughts from his expreſſions, which are the natural images of them. He has expreſſed himſelf in a different manner, then he had a different intention; and we can never regard this clauſe otherwiſe then as a real *fidei-commiſſary* ſubſtitution.

Let us examine whether the failure of the inſtitution is ſufficient to annul ſuch a ſubſtitution, or whether the defect may be repaired by preſumptions of the teſtator's intentions?

Whatever oppoſition there may be, between the maxims which have been propoſed to you by the reſpective parties, concerning this difficulty; we have at leaſt this advantage, that they are at length agreed upon two general principles, which we may take for granted as rules eſtabliſhed by the laws, explained by the doctors, and confirmed in this cauſe by the admiſſion of the one party and the other.

The firſt principle is, that as long as the teſtament ſubſiſts, a mere interruption of the degrees is not ſufficient to interrupt the courſe and progreſs of a ſubſtitution, and that when a degree happens to fail, that which is next in ſucceſſion takes its place, and is intitled to all its rights.

Thus for inſtance, ſuppoſe that the *Comte de Saint Pol*, in caſe of his death without children, had been merely charged with rendering the effects to *Madame de Longueville*, and *Madame de Longue-*

ville, in her turn, had been charged with rendering them to the *Princes de Conty*, the death of *Madame de Longueville*, before that of the *Comte de Saint Pol*, would not have excluded the *Princes de Conty*, for ever, from the ſucceſſion: on the contrary, they would have ſtood in her place, and would have received the property from the hands of the *Comte de Saint Pol*, inſtead of receiving it from the hands of *Madame de Longueville*.

This principle is founded upon the common maxim: *ſubſtitutus ſubſtituto eſt ſubſtitutus inſtituto*, and although the 27th and 41ſt laws, *ff. de Vulg. et Pupill. Subſt.* only eſtabliſh this maxim, with regard to vulgar ſubſtitutions, the ſentiments of the doctors have with reaſon extended them to *fidei-commiſſary* ſubſtitutions. *Cujas* decides it formally, not only in the conſultation which has been cited to you, but alſo in his Commentary on the 27th law, and the reaſon which he gives, is taken from the very nature and principal character of a *fidei-commiſſary* ſubſtitution, which has no rule more certain, or more inviolable than the intention of the teſtator.

Now it is evident that when a teſtator eſtabliſhes ſeveral degrees in his ſucceſſion, it is not for the purpoſe of excluding the moſt diſtant, but to inveſt them with it only after thoſe who precede them in the order in which they are mentioned, (ſuch is the expreſſion of the law,) as well as in the order of the teſtator's benevolence and affection; ſo far, therefore, is the interruption or rather the failure of a nearer degree, from excluding one that is more remote from the right, which the teſtator has given in his ſucceſſion, that it only ſerves to approximate it and remove the obſtacles, which retard or diminiſh its expectations.

We ſhall not adduce at preſent the opinions of other expoſitors. We might cite almoſt all who have written upon theſe ſubjects. We ſhall content ourſelves with obſerving, that *M. Maynard* has collected ſeveral deciſions of the parliament of *Toulouſe*, which have confirmed this maxim by their authority, and that *Faber*, who ſtands alone in his book *de Erroribus Pragmaticorum*, againſt the unanimous ſentiment of other writers, candidly admits, that the queſtion has been adjudged conformably to the general opinion by the ſenate of *Chambery*.

The ſecond principle, which is more important, and more eſſential to the deciſion of this cauſe than the firſt, is one upon which all parties have agreed in their laſt replies, that is, that as a general rule, the fate of the teſtament is attached to that of the inſtitution of the heir; that the particular legacies are as it were borne down by the ruin of the inſtitution, and that the rigour of the law regards thoſe as dead without a teſtament, who, after having made

one,

one, have not had the good fortune to revive in the perſon of the inſtituted heir.

But it is contended that a general exception ought to be made, in favour of univerſal *fidei-commiſſa*.

[*The examination and refutation of this argument occupy* 15 *pages, from* 315 *to* 330; *which are here omitted.*]

But if the caducity of the inſtitution is always followed by that of the *fidei-commiſſary* diſpoſition, when we conſider the teſtament merely as a teſtament, ought we to decide the contrary when it is regarded as a codicil? That is a ſecond queſtion of law, which we have to examine, with regard to the title of the *Prince de Conty*.

Remember here, if you pleaſe, Sirs, the terms in which this clauſe is conceived. We will repeat them, in order that we may the more eaſily examine its nature and effects.

He declares that he wills, that his teſtament ſhall avail by way of a nuncupative teſtament, and if it cannot avail by way of teſtament, it ſhall avail by way of codicil, donatio cauſa mortis, *and every other diſpoſition in the nature of a laſt will, by which it may lawfully prevail and beſt ſubſiſt.*

The terms of this clauſe are very extenſive. They compriſe all kinds of diſpoſition, and ſufficiently indicate that the teſtator deſigned that his laſt will ſhould be executed, under whatever form it might be conſidered.

It ſeems at firſt that the mere reading of this clauſe would be ſufficient to decide the conteſt in favour of the *Prince de Conty*.

The only ground which renders the *fidei-commiſſary* diſpoſition ineffectual, is a failure of the inſtitution; now this ground ceaſes, the inſtant the teſtament is regarded as a codicil; ſo far is it from being neceſſary in an inſtrument of that nature, that there ſhould be an inſtitution of an heir, that it would be void if there was one; and the greateſt favour, or rather the greateſt condeſcendence of the juriſts is limited to converting into an univerſal *fidei-commiſſion*, that which bears in a codicil the marks and character of a direct inſtitution, and ſince the inſtitution of an heir is not only uſeleſs, but forbidden in a codicil, may we not reaſonably conclude, that the failure of the inſtitution does not annihilate the other diſpoſitions, which occur in ſuch an act?

Whatever appearance of truth there is in this propoſition, it is attacked by a great number of objections which appear very conſiderable.

In the firſt place, it is ſaid that the *Prince de Conty* can no longer have the aid of the codicillary clauſe, after having ſolemnly

renounced it. Such you are told is the rigorous diſpoſition of the 8th law of the *Cod. de codicil* (*a*), which decides that all variation and inconſtancy are forbidden upon this ſubject; and that the perſon who has once taken the quality of a teſtamentary heir, cannot afterwards claim by virtue of the codicillary clauſe, which ſuppoſes the teſtament no longer to ſubſiſt.

But in the firſt place, we may aſk thoſe who offer this argument, where is the law, where is the ordonnance which regulates this proceeding amongſt us in ſo rigorous a manner? And although, for the deciſions of queſtions of right, we are obliged to follow the authority or rather the reaſon of the *Roman* law, who can ſuppoſe that in regulating the proceedings before the *Requêtes du palais*, it was neceſſary to go and conſult the formulæ and terms of actions which were eſtabliſhed by *Roman* law, and which with us are regulated by more equitable principles?

Beſides, we might maintain with a great deal of reaſon, that we are not preciſely within the caſe of that law; that it ſuppoſes two rights united in the ſame perſon, the one by virtue of a direct inſtitution; the other by virtue of an oblique and *fidei-commiſſary* ſubſtitution, to be preſumed from the codicillary clauſe. And the emperors *Arcadius* and *Honorius* obliged him who had theſe two different titles, to confine himſelf to one of them; the choice was opened to him at the commencement of the action, but when once made could not be varied, but here the *Prince de Conty* has not made any election. He has united the two rights in his demand, without attaching himſelf to the one rather than the other. He has demanded to be admitted as teſtamentary heir, and he alſo claims by virtue of the codicillary clauſe, by demanding a deliverance of the legacy from *Madame de Nemours* as heir *ab inteſtato*.

We cannot deprive him of either the one action or the other, and we may even ſay that there is no more reaſon to deprive him of a right which he has in execution of the codicillary clauſe, than of that which he claims by virtue of the inſtitution. He has choſen the one, as he has choſen the other, the two qualities unite and are blended in his perſon, and if the reaſon oppoſed to him was juſt, he might loſe both the one quality and the other, as he has equally aſſumed them both.

(*a*) Si quis agere ex teſtamento quolibet modo, ſive ſcripto, ſive ſine ſcriptura confecto, de hereditate voluerit; ad fidei-commiſſi proſecutionem adſpicere cupiens, minime permittatur. Tantum enim abeſt, ut aditum cuiquam pro ſuo migrandi deſiderio concedamus; ut etiam illud ſanciamus, ſi teſtator ſedens teſtamentum, in eodem *pro codicillis etiam id valere* complexus ſit: qui hereditatem petit ab ipſis intentionis exordiis, utrum velit, eligendi habeat poteſtatem, ſciens ſe, unius electione, alterius ſibi aditum præcluſiſſe.

All

All that *Madame de Nemours* can conclude from this law, in regard to the preſent cauſe, is, that the *Prince de Conty* ſhould be obliged to make his option at a given time, and declare whether he will have the title, of which he demands the execution, regarded as a teſtament or as a codicil. Then there might be ſome colour for this pretence, but at preſent, it cannot be ſaid that the *Prince de Conty* has renounced either of his rights, becauſe he has propoſed both of them equally.

The ſecond objection, that has been made againſt the codicillary clauſe, is one which it does not appear more difficult to deſtroy.

They have cited the authority of a doctor, who has written a treatiſe upon the codicillary clauſe, in which he ſays, that it can have no effect, when the force and nature of it have not been explained by the notary. What probability, ſay they, is there, that it was explained to a man, who has not yet learned to diſtinguiſh his relations from his friends, as appears by the preamble of his teſtament?

The principle which this author eſtabliſhes, may be juſtly conteſted; but, even admitting it, what will be the conſequence, ſuppoſing it was neceſſary that the notary ſhould explain the force and effect of the codicillary clauſe? Shall it not be preſumed that he has done ſo, and ſhall the performance of laſt wills depend upon the proof of a fact of this deſcription? If ſuch a point was propoſed in your audience, and an allegation was offered, that the notary had not explained the effect of this clauſe to the teſtator, would you admit the proof of it? Is not every thing, which is of the ſubſtance and eſſence of the act, proved by the act itſelf, and when a teſtator is endowed with ſanity and reaſon, will the intereſt of the public permit you to receive proof, that he did not underſtand the clauſes which he has himſelf ſigned? They may ſay as much as they pleaſe that this clauſe is a clauſe of ſtyle; for that very reaſon it is rather to be preſumed that the teſtator underſtood it, and if this liberty was once allowed, parties would ſoon demand a right of proving that a ſane and reaſonable teſtator did not comprehend the eſſence and conſequences of a derogatory clauſe, or of a general revocation, and nobody is more intereſted than *Madame de Nemours*, in contending that proof ſhall not be permitted that a teſtator did not underſtand what he has ſigned as his teſtament.

You ſee then, Sirs, that this objection is not leſs contrary to the particular advantage of *Madame de Nemours*, who propoſes it, than to the intereſt of the public: let us proceed to the other arguments, that have been urged againſt the codicillary clauſe,—arguments much more important than thoſe which have been already conſidered.

You have been told that it was neceſſary to diſtinguiſh between two kinds of codicillary clauſes, the one vague and general, ſuch as that in queſtion; the only effect of which is to ſupply the defects of ſolemnity, and never thoſe of intention. The other preciſe, expreſs, and particular, by which a teſtator requeſts by name, his legitimate heirs, to execute his laſt will; and as this laſt kind of codicillary clauſe is a new will of the teſtator, it is doubtleſs ſufficient to ſupply any want of intention in the teſtament.

They have ſupported this reaſoning by the authority of *James Godefroy*, upon the *Theodoſian* code, who lays it down as a certain maxim, that the mere codicillary clauſe cannot ſupply the defect of intention, or repair the vices which affect the ſubſtance of the teſtament.

Here theſe two circumſtances are united.

The defect of intention, as the *Princes de Conty* are only appointed under a condition, which has never taken place.

An eſſential vice which affects the ſubſtance of the teſtament. Can there be a greater defect than the failure of the inſtitution, which, according to all the juriſts, is the foundation, the baſis, the life of the teſtament? Before we anſwer this objection, which is the only one that has any colour, we muſt take a curſory review of the general principles which the law has eſtabliſhed concerning the nature and effect of codicils, in order that we may afterwards make a juſt application of them to the codicillary clauſe.

Without enquiring here, into the origin of this diſpoſition by way of codicil, which may be juſtly called a teſtament according to the law of nations, and which in effect is the only one, of which we have retained the uſe; let us barely remark, that a codicil is nothing elſe than a requeſt addreſſed by a dying man, to his heir, by which he intreats him to execute a will leſs ſolemn than a teſtament. Hence it ariſes, that according to the firſt principles of *Roman* juriſprudence, direct terms and imperative expreſſions are abſolutely unknown in this kind of diſpoſition, and whilſt they are eſſentially neceſſary in teſtaments, they are fatal in codicils. A teſtator commands, but he who makes a codicil entreats. The one ordains, as inveſted with the authority given him by the law; the other ſupplicates by virtue only of the power, which nature ſeems to have attached to the prayers of a dying man.

Let us pauſe a while upon this juſt and natural idea of a codicil, which can only be conteſted by thoſe who have not any tincture even of the firſt principles of the civil law. Every codicil is naturally and eſſentially an efficacious prayer (*une priere* ENIXE) (*a*), a ſup-

(*a*) The word *enixe* appears from other pleadings to be a term of particular energy in the French juriſprudence.

plicatory

plicatory intention addreſſed to thoſe who have already the title of heirs.

By virtue of this prayer, which is always ſure to obtain what it demands, this intention is certainly efficacious; and we may ſay of teſtators, what was formerly ſaid of kings, that their requeſts are commands. But it is always a prayer, it is always a ſupplicatory intention, and it is that which diſtinguiſhes it eſſentially from a teſtament.

As there are two ſorts of heirs, the one teſtamentary and the other legitimate, there are alſo two ſorts of codicils: and their difference is founded upon the different quality of the perſons to whom thoſe prayers, which form the whole eſſence of codicils, are addreſſed.

The codicils of the firſt kind are thoſe which are made (according to the language of the laws) *ad teſtamentum*, which are regarded as a ſequel, as an acceſſary, as a dependency upon the teſtament; becauſe in this caſe it is only to the inſtituted heir that the teſtator addreſſes his requeſts. Hence it follows that this kind of codicil follows the nature and deſtiny of the act to which it is attached; and, as it ſubſiſts, if the teſtament ſubſiſts, it is alſo extinguiſhed with the teſtament. But there is alſo a ſecond kind of codicils, independent of a teſtament; and theſe are ſuch as every man, having a teſtamentary capacity, makes without making a teſtament. And whereas in the firſt, the codicil is regarded as a prayer addreſſed to the inſtituted heir; in the laſt, it is always conſidered as a prayer to the legitimate heir.

This diſtinction is clearly eſtabliſhed in the law, 16. *ff. de jure codicill.* where the juriſt explains it in theſe terms: *Et ut manifeſtius dicam, inteſtato patrefamilias mortuo, nihil deſiderant codicilli, ſed vicem teſtamenti exhibent, teſtamento autem facto, jus ſequuntur ejus.*

Such is the nature of a codicil, and ſuch are its different kinds, and, this being premiſed, nothing appears more eaſy, than to explain the effects of the codicillary clauſe.

What is a codicillary clauſe? It is a diſpoſition which has the effect of changing a teſtament into a codicil, of ſubſtituting in the place of an abſolute law a requeſt, which is often more efficacious, to cauſe that which cannot avail as teſtament according to the ſtrictneſs of the law, to be executed as a codicil according to the rules of equity. But as we have diſtinguiſhed two ſorts of codicillary clauſes, the one attached to a teſtament, the other independent of a teſtament, what will be the effect of the codicillary clauſe, in that favourable converſion which it makes of a teſtament into a codicil? Will it be to make ſuch a codicil as follows the nature and deſtiny of the teſtament, or on the contrary, a co-

dicil which will ſubſiſt by itſelf, without any neceſſary relation to any other act, without any dependence on a teſtament?

It is not difficult, but it is very important, to anſwer this queſtion.

We ſay firſt, that it is not difficult, becauſe it is evident that a codicillary clauſe can never make a codicil of the firſt kind, that is to ſay, a codicil which is inſeparably attached to the deſtiny of a teſtament; for ſince it is the teſtament itſelf, to which it gives the form and nature of a codicil, to what teſtament ſhall it be attached, as there is no longer any ſubſiſting, and the teſtator has only added this important clauſe to ſupply the default of a teſtament, to take its place and be executed as a ſettled intention, (*comme volonté enixe*) in caſe the teſtament cannot have effect as a ſolemn act? Now if it is abſurd to ſay, that a codicillary clauſe can ever render a teſtament a codicil of that kind which the law calls *appendicem et ſequelam teſtamenti*, what concluſion can remain, but that the force and virtue of this clauſe conſiſts preciſely in making a codicil of the ſecond kind which ſubſiſts of itſelf, without borrowing its life and being from the teſtament? We ſay, in the ſecond place, that it is important to anſwer this queſtion, however eaſy it may be to decide it, becauſe from this ſingle anſwer we may deduce all the principles which regard the codicillary clauſe, and the ſolution of all the objections by which it is contended to be uſeleſs, under the circumſtances of the preſent caſe.

In fact, if the nature of the codicillary clauſe is to render the teſtament to which it is added entirely ſimilar to a codicil, that would ſubſiſt without the ſupport of a teſtament, the definition of this clauſe will be the ſame with that of ſuch a codicil. Now what is the definition of this kind of codicil, if it is not, as we have already curſorily hinted, a prayer addreſſed by a dying man to his legitimate heir, by which he conjures him to accompliſh his laſt wiſhes? For ſince every codicil is eſſentially a ſupplication made to the heir, and as there are two ſorts of heirs, the one teſtamentary and the other legitimate, from the moment that this ſupplication can no longer be addreſſed to the teſtamentary heirs, becauſe the law ſuppoſes there not to be any ſuch, it neceſſarily follows, that the legitimate heir is its only object.

The whole nature and force of the codicillary clauſe then is included in theſe two principles, which we ought not to be called upon here to prove; firſt, that this clauſe is made to ſupply the defect of a teſtamentary heir, and conſequently that it ſuppoſes there not to be any ſuch heir; ſecond, that it has the effect of ſubſtituting the legitimate heir, in the place of the teſtamentary heir, by thoſe efficacious

efficacious and energetic prayers, which every teſtator is preſumed to addreſs to his heirs by blood, by the mere terms of the codicillary clauſe.

What is the natural conſequence of this definition and theſe principles? it is, that you are not, as has been attempted in this cauſe, againſt the moſt clear texts of the civil law, againſt the unanimous concurrence of all the doctors, without any one exception, to diſtinguiſh two ſorts of codicillary clauſes; the one expreſs, formal, ſupremely efficacious, addreſſed by name to the heirs by blood; the other vague, general, clauſes of ſtyle rather than of intention, and which can at moſt only repair ſome defects of ſolemnity.

It is agreed, that if the codicillary clauſe which we are examining, was conceived like thoſe of the firſt kind, the pretenſion of *Madame de Nemours* would not be maintainable, and that ſhe would be without difficulty chargeable with the *fidei-commiſſion*, in favour of the *Prince de Conty*.

But it is contended that as the codicillary clauſe in the teſtament of the *Abbé d'Orleans*, is only conceived in general terms, it does not contain any formal prayer which is obligatory upon *Madame de Nemours*.

In the firſt place, we ſhould be glad to aſk thoſe who propoſe this diſtinction where they have found it. Is it in the text of the law; is it in the ſentiments of the doctors; is it in the authority of decided caſes? they have not as yet cited any law which eſtabliſhes it, any doctor who follows it, any judgment which confirms it. Let us pauſe a moment to weigh the force of this argument; although it is negative, it almoſt forms a demonſtration in regard to the preſent queſtion.

If it were true that this diſtinction of two kinds of codicillary clauſes was known in the law, it would doubtleſs be a firſt principle and a fundamental maxim upon the ſubject. But if that was ſo, how would it be poſſible for the ſcrupulous exactneſs of the counſel of *Madame de Nemours*, who have extended their reſearches to laws, the moſt indifferent, and the moſt remote from the preſent caſe, not to have found in the whole range of the law, at leaſt ſome obſcure and difficult text, from which they might deduce by a doubtful interpretation, this important diſtinction upon which their whole defence is to turn? How could this uſeful and neceſſary principle have eſcaped the attention of all the juriſts, in the infinity of laws, reſpecting teſtaments? How happens it that *Juſtinian* has made no mention of it in his Inſtitutes? How does it happen that of all the ancient and modern interpreters of the law, pregnant with diſtinctions, fertile in queſtions, authors

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of an infinity of novel doctrines, which are frequently repugnant to the text of the laws, none have hit upon this eſſential difference, between the different kinds of codicillary clauſes?

Let it not be ſaid that a mere compariſon of ſome laws is ſufficient to manifeſt this diſtinction. In ſome, as for inſtance, in the law, *Titia*, 13. *ff. de inf. teſtam.* (*a*) the heirs, *ab inteſtato*, are *nominatim*, and expreſsly requeſted by the teſtator, to accompliſh the diſpoſitions of his teſtament, in others as in law 8. *C. de codic.* the teſtator merely ſays, that he wills his teſtament ſhall avail as a codicil, *pro codicillis etiam id valere* (*b*), and that from theſe different formulæ, we may and ought to conclude that one codicillary clauſe is often very different from another.

Thoſe who make this difficulty, forget that we are examining, not the form, but the effect of the codicillary clauſe.

If we were only inquiring about the form, the diviſion would be very imperfect, they might not only diſtinguiſh two kinds, but alſo reckon up five or ſix, of which we have examples in the Digeſt, and it is ſhewn by *Cujas*, and all the other expoſitors, that the number is not determined; that there is not in regard to this ſubject, any fixed inviolable formula, which conſiſts in a certain arrangement of words: the good faith that governs theſe diſpoſitions, which were fortunately invented to mitigate the rigour of the law, does not ſuffer them to be confined within ſuch narrow bounds; every expreſſion, even every conjecture which induces a preſumption, that the teſtator intended his teſtament to be executed, even though the inſtituted heir ſhould not be in a ſituation to maintain it, is ſufficient to have the character of a real codicillary clauſe.

But here what is it that we ſeek? it is not the form, it is the execution, it is the effect of the codicillary clauſe. Now, in this reſpect, all codicillary clauſes are equal. This is what we have as yet only proved, by a negative argument, from the ſilence of the laws and the doctors. We are at preſent to prove it, by the principles of the law, by the authority of the juriſts, and by the opinion of the interpreters; three poſitive arguments, which will place this truth beyond a ſhadow of doubt.

Can the principles of law admit of any difficulty, after all the

(*a*) Titia filiam heredem inſtituit, filio legatum dedit, eodem teſtamento, [ita] cavit, "*Ea omnia, quæ ſupra dari, fieri juſſi, ea dari, fieri volo ab omni herede, bonorumve poſſeſſore, qui mihi erit etiam jure ab inteſtato, item quæ dari juſſero, ea uti dentur, fiant* [*que*], *fidei ejus committo.*" Quæſitum eſt, ſoror centumvirali judicio obtinuerit, an fidei-commiſſi ex capite ſupraſcripto debeatur? [Reſpondi,] Si hoc quæratur, an jure eorum, quos ſibi ab inteſtato heredes, bonorumve poſſeſſores ſucceſſores credat, fidei-committere poſſit, reſpondi poſſe. Paulus notat: probat autem, nec fidei-commiſſa ab inteſtato data deberi, quaſi a demente.

(*b*) Vi. ſupra, p 500. note (*a*).

reflections we have already made? Let us reſume the courſe of our propoſitions. The codicillary clauſe reduces the teſtament to the condition of a codicil; this is its natural effect, even in the form which has been cited, as an example of codicillary clauſes that are vague, general, and imperfect. This is the firſt propoſition which we have examined. The codicil which this clauſe ſubſtitutes to a teſtament, is a codicil independent of any teſtament. The ſecond propoſition is, that every codicil independent of a teſtament is a prayer, addreſſed to the legitimate heir, and can be nothing elſe; for, in fine, there are in the law but two kinds of diſpoſitions,—diſpoſitions, which are direct, abſolute, imperative,—diſpoſitions which are oblique, precarious, ſupplicatory. A codicil is certainly not a diſpoſition of the firſt kind; it belongs then only to the ſecond. Then by a neceſſary conſequence, as the codicillary clauſe makes a codicil ſubſiſting by itſelf, and a codicil of this quality is a prayer to the legitimate heir, every codicillary clauſe is a prayer, either expreſſed or implied but always equally efficacious, which the teſtator addreſſes to thoſe who are deſtined by nature to ſucceed him. There are then in truth two kinds of codicils, the one addreſſed to the heir by blood, the other addreſſed to the legitimate heir; but there can be only one codicillary clauſe, becauſe it neceſſarily ſuppoſes the default of an inſtituted heir, and conſequently it can have no other object than the legitimate heir.

To whom does the teſtator ſpeak, When he ſays, *I will—I wiſh—I deſire—that my teſtament may be executed as a codicil?* Is it to the inſtituted heir? He ſuppoſes at the moment, that he is not in a condition to reap the fruit of his benefits. It is then always to the legitimate heir. Let him do it in expreſs terms, or by a general clauſe, ſtill he does it, both in the one caſe and in the other, and conſequently the execution of his intention will be always equally inviolable.

Let us join the authority of the laws, to the force of principles; and without making a heap of citations, let us apply ourſelves, to a ſingle text, which completely eſtabliſhes the maxim upon which the law and our opinion is founded. Every man, ſays *Ulpian*, who makes a codicil, ought to be conſidered as if he had inſtituted for his heirs, all thoſe to whom his property would belong, after his death; *Paterfamilias qui teſtamenti factionem habet, et codicillos faceret perinde haberi debet; ac ſi omnes heredes ejus eſſent ad quos, legitima ejus hereditas vel bonorum poſſeſſio perventura eſſet. L. 3. ff. de Jure Codicillo.*

Nothing is more clear or deciſive than this law; the force of the codicil conſiſts wholly in this, that the legitimate heirs are regarded

regarded as teſtamentary heirs (*a*). Why ſo? Becauſe the teſtator gives them whatever he does not take away, *dedit dum non adimit*, ſays the ſame *Ulpian* elſewhere. Now the codicillary clauſe makes a real codicil, then its effect is to ſubſtitute the heirs by blood to thoſe by the teſtament; it is to them only then that it is addreſſed.

Finally, if this principle could yet be doubtful, it would ſuffice to open any interpreter of the law, without exception; we ſhall not find any one, who has not taken it for granted, or expreſsly confirmed it; but let us paſs by this multitude of authors, in order to contemplate only two of the greateſt luminaries of the law, the one in *Italy*, the other in *France*, *Bartolus* and *Cujas*; What deciſion can be more formal than that of the former, when he ſays upon the firſt law, of the *Digeſt* de jure codicill. *iſta ſunt paria, relinquere a venientibus ab inteſtato, et dicere ſi non valet jure teſtamenti valeat jure codicillorum?* It is the ſame thing to charge *nominatim* the heirs, *ab inteſtato*, with the execution of a teſtament, or to ſay, if my teſtament does not avail as a teſtament, let it avail as a codicil; could he more expreſsly condemn the new diſtinction of two kinds of codicillary clauſes? *Cujas* does not expreſs himſelf leſs preciſely than *Bartolus*, when he ſays, upon the title of the code, *de fidei-commiſſis*, that if the teſtament becomes void, the *fidei-commiſſa* which it contains are not due from the heirs of by blood, *addendum tamen deberi ſi ab inteſtato ſuccedentes rogati probantur vel rogati intelligantur ex generali et ſimplici ſermone teſtatoris vel ex clauſula codicillari*. You ſee, Sirs, that this great interpreter of the law, in like manner with *Bartolus*, conſiders the codicillary clauſe as equivalent to an expreſs prayer, made to the heirs by blood, and that he would have regarded the diſtinction which is propoſed to you, as a paradox in the principles of law.

It is with reluctance that we detain you, by proving ſo much at length ſo certain a principle; but as this is the capital point upon which all the arguments of *Madame de Nemours* depend, it was abſolutely neceſſary to confirm the principle by all theſe reflections, after which nothing will be more eaſy than to anſwer the difficulties which are oppoſed to the codicillary clauſe.

Thoſe who have defended the intereſts of *Madame de Nemours*, agree that if the teſtament of the *Abbé d'Orleans* contained an expreſs prayer, addreſſed to the heirs by blood, the caſe of the *Prince de Conty* would be indiſputable: now we have ſhewn by general principles, by the authority of particular laws, by the ſentiments

(*a*) The Engliſh lawyer will of courſe here be ſtruck with the recollection of a directly oppoſite principle.

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of expoſitors, that it is the ſame thing to requeſt the heirs by name and to requeſt them in general by a codicillary clauſe: where then can be the difficulty? Let us however anſwer a little more at length the two principal objections, by which they would elude the power and efficacy of this clauſe.

We have already glanced at them in paſſing.

It is ſaid, in the firſt place, that the codicillary clauſe was only applied to repair a want of ſolemnity, and not an eſſential defect, in the ſubſtance of the teſtament, ſuch as a failure of the inſtitution.

After the principles which we have eſtabliſhed, three very ſhort reflections will be ſufficient entirely to deſtroy this firſt objection.

So far is it from being true, that the codicillary clauſe cannot remedy the eſſential defect of the failure of the inſtitution, that it was preciſely for that purpoſe that it was introduced. It was only, as we have ſo often ſaid, for the purpoſe of ſubſtituting the legitimate to the teſtamentary heir. If the inſtitution was not void, the codicillary clauſe would be uſeleſs, and it is now argued that it ſhall be deſtroyed by the very circumſtance which is the cauſe of its ſubſiſting, and that it ſhall loſe its efficacy preciſely in the very caſe for which its aſſiſtance is reſorted to.

Let us go further, and add, in the ſecond place, that however ſlightly we conſult the principles of natural reaſon, we ſhall agree that what diſtinguiſhes a teſtament from a codicil, an inſtitution from a *fidei-commiſſion*, is a mere ſubtility of civil law, which only conſiſts in the term HEIR. What is a teſtament? *Directa hereditatis datio.* What is an univerſal *fidei-commiſſion? Obliqua hereditatis datio.* What they have both in common is a donation of the property of the teſtator. Wherein do they differ? In this, that the one is made in terms of command, the other in terms of requeſt. Now what is there in all this but a mere formality which nevertheleſs, by the rigid principles of law, occaſions, as we have ſhewn, a failure of the teſtament? If then it is agreed, that the codicillary clauſe has the force of repairing the defects of ſolemnity, it muſt be agreed, that it is ſufficient in this caſe to remedy the failure of the teſtament, founded entirely upon a rigorous ſolemnity.

Finally, and this is the third reflection which we oppoſe to this objection, it is certain that the want of ſolemnity renders the inſtitution void and ineffectual, in the ſame manner as the previous deceaſe of the inſtituted heir. Now if they are obliged to admit, that when theſe two defects, the want of ſolemnity, and the caducity which it induces as its conſequence, are joined together, the codicillary clauſe ſupports the teſtament, and prevents its falling to the ground, what reaſon can there be for its not

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repairing the caducity, when that is the only defect? What! Shall it be ſaid, that the teſtator intended that this clauſe ſhould have its effect, ſuppoſing the will to be impeached for want of formality, and that he did not ſtill more ſtrongly intend the ſame thing, in caſe the previous deceaſe of the inſtituted heir ſhould diſappoint his reaſonable hopes? But not to enter at preſent, into an examination of his intention, let us, in order to diſſipate even the ſlighteſt doubts, which may yet remain in the mind concerning this objection, add to all theſe reaſons, the preciſe opinions of the expoſitors of the law.

What ſays *Cujas* upon this queſtion? What are the caſes, in which he intimates that the codicillary clauſe ought to have effect? *Si teſtamentum deſtituatur, ſi injuſtum pronuncietur, ſi rumpatur, ſi irritum fiat, omnia quæ ſunt in teſtamento ſcripta, debebuntur, jure fidei-commiſſi, ab hæredibus legitimis.* This is upon the law of 77. *S. filius matrem, ff. de legat.* 2. Does he ſtop at the ſingle caſe of want of ſolemnity, or rather what caſe is there which he does not compriſe in theſe very extenſive terms? A teſtament which is abandoned, a teſtament which wants ſolemnity, a teſtament which is broken (*a*), a teſtament which is become void. Such, according to this writer, are the teſtaments into which the codicillary clauſe affords an efficacious remedy; he repeats almoſt the ſame thing upon the law, *Titia*, 13. *ff. de inof. teſtam.* he only excepts the ſingle caſe of the teſtament being inofficious, in which caſe the teſtator being preſumed to be in a ſtate of inſanity, cannot make either teſtament or codicil.

How do all the authors expreſs themſelves, whom *Madame de Nemours* has herſelf cited upon the queſtion of caducity? *Mantica* ſays preciſely, *ea vis eſt clauſulæ ut ſucceſſores inteſtati videantur rogati.*

Perigrinus expreſſes the ſame thing in other terms.

Menochius, in his 106th counſel, directly eſtabliſhes the exception of the codicillary clauſe, in the caſe of caducity.

It would be infinite if we were to go through all the others, who have ſupported this opinion; they are almoſt as many as there are interpreters of the law, and we do not believe that there is any propoſition more univerſally received in the whole ſyſtem of juriſprudence. It even ſeems, and we ſhall only add this ſingle obſervation, that *Paulus* intended to anticipate and remove this doubt, in the law 29. § 1. *ff. qui teſtam. fac. poteſt*: he examines the effect of theſe words, *hoc teſtamentum volo eſſe ratum, quacunque ratione poterit*, and he decides that the in-

(*a*) This expreſſion applies to the caſe of a will becoming void, by the birth of a poſthumous child.

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tention of the teſtator was to have his teſtament executed, *etiam ſi inteſtatus deceſſiſſet.* Then every thing which can cauſe him to die inteſtate, the defect of ſolemnity, the previous deceaſe, or the renunciation of the inſtituted heir, the birth of a poſthumous child, every thing was foreſeen, every thing was compriſed, every thing was included in the intention of the teſtator, and he was deemed to have provided for all theſe caſes by the codicillary clauſe.

It is added, in the ſecond place, and with a great deal of reaſon, that a codicillary clauſe cannot ſupply the defect of intention; how could it ſubſiſt without ſuch intention, ſince it is upon intention alone that it is founded? It is the mere favour of intention, which, contrary to the rigour of the law, produces it, ſupports it, renders it inviolable. It was uſeleſs to maintain ſo inconteſtible a principle by the authority of the learned and illuſtrious *Godefroy.*

But what conſequence can be drawn from this principle againſt the codicillary clauſe? Shall it be contended, that the intention of the *Abbé d'Orleans* was not in favour of the *Princes de Conty?* But what intention was ever more expreſs? He requeſts his mother to render them his property; it is true that if he had ſtopped there, an unexpected event might have interrupted the courſe and progreſs of his deſigns; it is true that the death of the heir charged with reſtitution might have deſtroyed the *fidei-commiſſion*; this we conceive is ſufficiently proved; in vain would they have availed themſelves of the force of his intention, if he had not made uſe of the only means allowed by the law, if he had not marked his intention to charge his legitimate heirs, with this *fidei-commiſſion*, but he has marked it clearly by the codicillary clauſe. He had the power of willing it, he has willed it, and beſides he has willed it in the form preſcribed by the law, what is there then deficient in his intention that could entitle it to a perfect execution?

If they would ſtill call in queſtion the intention of the teſtator, without repeating here all the reaſons that have been ſtated to you on the part of the *Prince de Conty*, and which we endeavoured yeſterday to bring before you, we ſhall apply ourſelves to the only reaſoning, to which we conceive there is any difficulty in giving an anſwer. Suppoſe for a moment, that the teſtator intended that which *Madame de Nemours* contends to be the object of his intention, and let us ſee if that ſuppoſition is not entirely deſtitute of probability.

It is already certain, that if the order of diſpoſition which he eſtabliſhed could have taken place, he intended that the *Princes de Conty* ſhould have taken his property by way of *fidei-commiſſion*; but in caſe the inſtituted heirs ſhould previouſly die, we muſt ſuppoſe

poſe with *Madame de Nemours*, that he no longer intended that the ſucceſſion ſhould paſs to the *Princes de Conty*, that is to ſay, that this is not the courſe and order of degrees preſcribed by the teſtator; that this courſe and order is a real condition, and a condition ſo neceſſary, that the defect of it may render the *fidei-commiſſion* uſeleſs, and annihilate the whole of his diſpoſition.

Let us at preſent develope this idea, and endeavour in a few words, to render it intelligible.

What is it then that the *Abbé d'Orleans* intended? That if the *Comte de St. Pol*, or *Madame de Longueville* could take the ſucceſſion they ſhould render it entire to the *Princes de Conty*; but if both the one and the other ſhould die before him, the *Princes de Conty* ſhould be deprived of the ſucceſſion, and this at the very time when by the codicillary clauſe he was charging his heirs by blood with the execution of his laſt intentions in defect of the teſtamentary heirs.

It is as if the teſtator had ſaid, I charge my teſtamentary heir to reſtore my effects to *Mevius*; but if my heir ſhall die before me, I will that my effects ſhall be left to my legitimate heirs.

Now what can be more abſurd or inconceiveable, than ſuch an intention? The inſtituted heir was a medium, an obſtacle, a kind of dam, which ſuſpended and retained the courſe of the teſtator's benefits, that were ready to pour on the *fidei-commiſſary*, and becauſe this medium can no longer ſubſiſt, becauſe this obſtacle is removed, becauſe this dam is broken, the ſource of the teſtator's liberality ſhall all at once be dried up, he ſhall loſe ſight of the object of his tenderneſs, becauſe that object is brought nearer to his view; he regarded him when at a diſtance, he ceaſes to regard him the moment that there is nothing to ſeparate them.

Let us put this reaſoning in a ſtill clearer point of view; the order of inſtitution, the order of the writing is the image and proof of the order of the affection and intention of the teſtator; this being ſuppoſed, who was the perſon chiefly regarded by the *Abbé d'Orleans*? The *Comte de St. Pol*: who ſucceeded next in the order of affection? His mother; next follow the *Princes de Conty*; and finally, in the fourth degree, the heirs by blood, whom he might ſtill deprive of his effects, by a long courſe of ſubſtitutions, but whom he is ſuppoſed to have taken into conſideration in the codicillary clauſe.

He has then preferred the *Princes de Conty* to his heirs by blood, and he has preferred them at a time when he hoped to have two heirs who were to take before them, and it is ſuppoſed that at a time when there is no perſon to precede them in the affection of the teſtator, he has excluded them, in favour of thoſe whom he

has only contemplated after them, that is to ſay, in favour of his legitimate heirs. He preferred them to his heirs by blood, when they only held a third rank in the order of his diſpoſition; he ceaſes to prefer them upon their attaining the firſt.

This then is the point to which his intention, according to the conſtruction of *Madame de Nemours*, is reduced. *I will that the Princes de Conty ſhall take my ſucceſſion, provided another perſon precedes them therein; but if no other perſon precedes them, I will that they ſhall be no longer intitled to the quality of heir, and I leave my property to my legitimate heirs.*

If ſuch an intention cannot be probable, if all the ſteps that have been taken to come at this interpretation are ſo many impoſſible ſuppoſitions, if they are full of darkneſs, contradiction, and abſurdity, what concluſion can we make, but that the intention of the teſtator is expreſs, that his will is certain; and conſequently that this is the very caſe in which the codicillary clauſe ought to have effect, ſince it was only invented in order to lend a hand to the intention that was in danger of failing by the rigour of the law.

Let us here reſume the courſe of our principles. There are two ſorts of codicils, the one addreſſed to the inſtituted heir, the other to the legitimate heir; but there is only one kind of codicillary clauſe, becauſe that can have no other object but the heir by blood. Reaſon, the law, the expoſitors, all concur in eſtabliſhing that this clauſe is eſſentially, and in its nature, the prayer of a dying man to his legitimate heirs. Its favour, its force, its authority is ſo great, that it can repair not only the defect of ſolemnities, but may even come in aid of the failure of the teſtament. There is nothing but the defect of intention which it cannot ſupply, but never was there an intention more clear than that which appears in the preſent cauſe. Then the codicillary clauſe ought to be conſidered as a deciſive argument, removing all the difficulties which might ariſe from the queſtion of caducity.

Notwithſtanding the chain and connection of theſe propoſitions, two objections have yet been made, the one ancient, the other novel, which it is proper to ſatisfy before we conclude what relates to this part of the cauſe.

The firſt is, that codicillary clauſes have no effect in our laws, becauſe, in fact, all our teſtaments are nothing elſe than real codicils.

The ſecond, founded on the authority of ſome laws, in which it is ſaid, that if a teſtator, ſuppoſing himſelf to have only one legitimate heir, charges him with any *fidei-commiſſa*; theſe do not oblige the new heir, who may appear after his death, but they will be reduced to a moiety, which only falls upon him who is charged

by name by the teſtator, from which it is concluded that as the *Abbé d'Orleans*, having two heirs, the *Comte de Saint Pol*, and *Madame de Nemours*, has only charged one of them expreſsly with the *fidei-commiſſion*, the other ſhall be diſcharged from it.

The firſt objection might be plauſible, if it was propoſed by the *Prince de Conty*; but it is ſurpriſing that the defender of *Madame de Nemours* ſhould have thought it poſſible to adduce it as a reaſon on his ſide of the cauſe.

It is true that codicillary clauſes are unknown, or rather that they are abſurd in a codicil, and conſequently, that our teſtaments are nothing more than real codicils. But in the firſt place, the queſtion here relates to a teſtament made in a province governed by the general written law. This anſwer might ſuffice. But let us go further, and ſhew, that the conſequence to be deduced from this reaſoning would be directly contrary to the intereſts of *Madame de Nemours*.

Let us grant to thoſe who adduce this argument every thing they require: the codicillary clauſe has no effect upon codicils, all our teſtaments are codicils, the very teſtament we are examining can only be regarded as a codicil; but what will be the concluſion that may be expected from all theſe ſuppoſitions? Surely the following, according to all the principles of law. If it is a codicil, there is no inſtitution of an heir, the act not being ſuſceptible of that operation. If there is no inſtitution, then all the direct diſpoſitions become oblique, then the inſtitution of the *Comte de Saint Pol* and *Madame de Longueville* becomes a *fidei-commiſſion*; if it is only regarded as a *fidei-commiſſion*, then it is of the ſame nature with the diſpoſition in favour of the *Princes de Conty*. If it is of the ſame nature, there is no need of recurring to the converſion of a *fidei-commiſſary* ſubſtitution into a direct ſubſtitution; if this converſion is uſeleſs, if the inſtitutions and ſubſtitutions formed by the teſtament are all of the ſame kind, then by a neceſſary conſequence, admitted by the counſel of *Madame de Nemours* themſelves, the interruption of degrees cannot defeat the laſt ſubſtitution; then whoever is ſubſtituted to the ſecond heir, is conſidered as ſubſtituted to the firſt, then the diſpoſition has not failed, then the teſtament ſubſiſts by itſelf; and in effect, when it is ſaid, that it would be abſurd to admit a codicillary clauſe in a codicil, it is not becauſe it is contrary to the ſpirit and nature of a codicil, but becauſe it would be ſuperfluous and redundant. If the whole effect of it is to make a codicil of a teſtament, why ſhould it be added to that which is a codicil, and can be nothing elſe; it would be a deriſory diſpoſition for a teſtator to ſay, I will that my codicil ſhall avail as a codicil.

Nothing

Nothing further is neceſſary to confirm the truth of what we obſerved in the outſet, that this reaſon is offered quite out of place, that it would have a great degree of plauſibility in the mouth of the *Princes de Conty*, but in that of *Madame de Nemours*, can only ſerve to form an invincible argument againſt her.

Let us finiſh in a few words, every thing relative to this queſtion, by the anſwer which we think ought to be given to the laſt objection; and which has only been propoſed in two papers, that have been placed in our hands within theſe two days.

Let us retrace, in the firſt place, the nature of the laws upon which it is founded. A man who ſuppoſes himſelf only to have one heir, and who, notwithſtanding, has two, makes a codicil by which he charges the only heir whom he is appriſed of, with a *fidei-commiſſion*; after his death there appears a ſecond heir, it is demanded in the firſt place, if he can be ſubjected to the performance of the *fidei-commiſſion*, as to the part and portion which belongs to him; it is next demanded, if the co-heir, whom the teſtator has expreſsly charged with a *fidei-commiſſion*, is ſubject to the whole or only to a moiety.

Upon the firſt queſtion, *Papinian* does not doubt but that the new heir, who is abſolutely unknown to the teſtator, ſhould be diſcharged; the ſecond queſtion he conſiders more difficult, but upon principles of equity, he is induced to adopt the opinion that the *fidei-commiſſion* ought to be reduced to a moiety.

We do not examine at preſent, whether this interpretation has not more ſubtlety than ſolidity, whether it would be received amongſt us, and whether there would not be a greater degree of reaſon in concluſions directly oppoſite. In a word, whether it ought not to be decided, that as the teſtator intended to charge with a *fidei-commiſſion*, the heir whom he knew, it ought not to be preſumed that he would be ſtill more diſpoſed to have charged the other whom he did not know, and that it is difficult to conceive, that he would have cut off, in favour of an unknown perſon, a moiety of the legacy which he gave to the *fidei-commiſſary*.

Without combating preſumptions by preſumptions, and effacing one colour by another, let us take it for granted that the interpretation of *Papinian* is the only one that is juſt, the only one that is equitable, the only one conformable to the principles of law. We confeſs that, even upon this ſuppoſition, it is not eaſy to divine what conſequence can be deduced from it, for the deciſion of this cauſe.

There is ſo great a difference between the one caſe and the other, that it is aſtoniſhing how it ſhould enter into the mind of

any body, to make an application of it to the teſtament we are now examining.

What is the reaſon upon which *Papinian*, and after him *Cujas*, found their determination? It is only upon the ignorance of the teſtator, *cum exiſtimaret ad ſolam conſobrinam ſuam bona perventura.* It is eaſy to perceive the principle of this deciſion.

Fidei-commiſſa are only ſupported by the intention, which is their life and foundation. Now it cannot be ſuppoſed, that the teſtator had any intention in reſpect to a perſon of whom he had no knowledge, and whom conſequently he could not believe to be his heir. Perhaps he would alſo have diminiſhed his charges upon the ſucceſſion, if he had ſeen that it would be divided among ſeveral perſons. His intention is uncertain, and in order to aſſure the perfect execution of the *fidei-commiſſion*, it ought to be certain. In a caſe of doubt, the heir is to be favoured; and as the mind of the teſtator cannot be certainly known, they come as near as poſſible to the ſpirit of nature and the law, which incline in favour of the heirs by blood.

Let us ſee, however, whether this principle has any application to the preſent caſe. Is that ignorance which is ſo deciſive, or which is rather the only principle upon which *Papinian* founds his deciſion, to be found in this cauſe? Shall it be ſaid, that the *Abbé d'Orleans* was ignorant of the number and quality of his heirs, that he erred, either in fact, by ſuppoſing that *Madame de Nemours* was not his ſiſter, or in law, by perſuading himſelf that his ſiſter was not as nearly related to him, and as capable of ſucceeding him, as his brother.

This is not all, it not only cannot be preſumed that he did not know his real heirs, it may even be demonſtrated to be impoſſible that he could have any perſon in view in the codicillary clauſe, except *Madame de Nemours.*

Let us follow up our firſt ideas; the codicillary clauſe is a prayer addreſſed to the legitimate heirs, and the *Abbé d'Orleans* had only three of this quality, the *Comte de Saint Pol*, *Madame de Longueville*, and *Madame de Nemours*. He addreſſes himſelf to the two firſt, in the inſtitution, he charges them by name, with the *fidei-commiſſion* in favour of the *Princes de Conty*, he addreſſes himſelf, to the laſt, by the codicillary clauſe. Why ſo? Becauſe one of the principal caſes, for which that clauſe is added, is the caducity of the inſtitution; that is to ſay, the previous deceaſe of the two inſtituted heirs. Then there is one caſe, in which he ſuppoſes that the two firſt heirs will not be in a condition to liſten to his prayers, and to obey his directions; and notwithſtanding that he ſtill continues to ſupplicate and to make himſelf be heard. To whom

whom then can he addreſs himſelf, if he has no other object than his legitimate heirs, and two of theſe are ſuppoſed to be dead? Is it not evident that he muſt only have in contemplation the third, the only one who exiſts, that is to ſay, *Madame de Nemours*, and conſequently that ſhe is, as we have already obſerved, almoſt *nominatim* charged by the teſtator.

After this we ſhall not anſwer ſeveral objections ſimilar to thoſe we have already examined; for inſtance, that which is deduced from teſtaments that are void for paſſing by a child, in which it is properly decided that the codicillary clauſe cannot have any effect, but upon the principles which we have already eſtabliſhed, that is to ſay, becauſe it is ſuppoſed in this caſe, either that there was no will, or if there was one, that it was unjuſt. Here the will is certain, here the will is juſt, the power of the teſtator and his will go together, and equally ſupport his diſpoſition.

In lieu of going into all theſe uſeleſs queſtions they might have introduced two others, which would have a much greater connection with the real nature of the teſtament.

The one would have been, whether the *Prince de Conty* was not obliged to have waited for the death of *Madame de Nemours*, before he could inſtitute his demand; and we ſhould have thought upon this queſtion, that a *fidei-commiſſion*, of which the performance is not expreſsly ſuſpended by the teſtator, is a preſent *fidei-commiſſion*, and may be demanded immediately upon the deceaſe of the perſon making it; and beſides, that even if it were not demandable until after the death of *Madame de Nemours*, it would ſtill be a preſent right in the *Prince de Conty*, and that he might demand the confirmation of it by all the ways capable of maintaining it, ſo that the delay may not prevent his diſcuſſing the queſtion, by the examination of witneſſes.

The ſecond queſtion is, whether *Madame de Nemours* would not at leaſt have a right to the deduction of the fourth part, on account of the Trebellian portions; but this queſtion would have appeared to us to be premature; it relates to the execution, and not to the validity of the title, and at preſent we are only inquiring into the validity.

Such, Sirs, are all the reflections which we have conſidered it our duty to make upon this firſt part of the cauſe, that is to ſay, upon that which relates to the title of the *Prince de Conty*. They are reduced to the ſingle propoſition, that the rigour of the law would have rendered the inſtitution void, and conſequently have defeated the *fidei-commiſſion*, if the codicillary clauſe had not given it a favourable ſuccour and ſupport.

Let us now proceed to the titles of *Madame de Nemours*, let us ſee whether they derogate from thoſe of the *Prince de Conty*, and whether the teſtament upon which he founds his title, not having failed in itſelf, is not at leaſt revoked by the acts which followed it.

The firſt of theſe acts is the donation; the ſecond, the teſtament of the 26th *February*, 1671.

We ſhall not enlarge at preſent upon what relates to the firſt, it might furniſh matter for a long diſſertation, which would conſiſt in examining in what caſes a donation revokes a legacy, or a *fidei-commiſſion*, and whether there is any diſtinction between particular *fidei-commiſſions* and univerſal ſubſtitutions. We ſhall only obſerve in general, that it would ſeem very difficult to ſupport, at the ſame time, an univerſal donation and an univerſal *fidei-commiſſion*, having different objects. It is true that the donation was only of preſent property, and the *fidei-commiſſion* included future; but on the other ſide, we ſee that in the donation, the *Abbé d'Orleans* ſtipulates for a right of return in favour of *Madame de Nemours*, after himſelf, and conſequently, it ſeems that the *Princes de Conty* had ceaſed to be the object of his affection and his bounty.

Without enlarging upon this queſtion, we think it ought to be decided upon the ſame fact of inſanity, by which they impeach the teſtament that immediately followed. If that act is the work of a perſon deſtitute of reaſon, the donation has the ſame defect, there being only three days interval between them. If the *Abbé* was in a ſtate of ſanity at the time of making the teſtament, he was likewiſe ſo at the time of the donation. If he was in a ſtate of imbecility, at the execution of the ſecond of theſe acts, he was ſo likewiſe at the making of the firſt; and as they only offer to deſtroy the laſt act, which evidently revokes the firſt teſtament, upon the ſingle ground of inſanity, let us enter upon this great and important queſtion, which is more difficult than all we have hitherto examined, which is truly worthy of the attention of the public, and ſtill more worthy of the regard of juſtice herſelf.

The general capacity of doing acts is founded upon a natural law, that of making a teſtament is the effect of a civil law, which affords to mankind a kind of conſolation for their mortality, by permitting them to revive, as it were, in the perſons of their ſucceſſors, and procure themſelves an image and a ſhade of immortality in a long ſucceſſion of heirs, who may be a laſting monument of the wiſdom and bounty of the teſtator.

And as the capacity of every man is eſtabliſhed upon both the one and the other of theſe laws, there are two kinds of cauſes which may deprive him of it; the one founded upon a natural reaſon, which

which is alone ſufficient to annihilate or ſuſpend the power of the teſtator; the other, although eſtabliſhed likewiſe upon a natural reaſon, requires the authority of the civil law to deſtroy that liberty of entering into engagements and making diſpoſitions, which the law gives to every perſon after a certain age.

Thus, for inſtance, the law depriving perſons in a ſtate of fury or imbecility of the faculty of making a teſtament, is a law purely natural, and does not require the aid of any poſitive law. Notwithſtanding the ſilence of legiſlators, it will be always true that a man deſtitute of underſtanding cannot make a valid diſpoſition. As long as reaſon ſhall ſubſiſt among men, the conſent of all nations will authorize this maxim, and by a neceſſary conſequence of this principle, it is manifeſt that, even before any interdiction, a madman is abſolutely out of the ſtate which is requiſite to make a valid teſtament. It is not the authority of the magiſtrate, it is that of nature herſelf, which pronounces his interdiction; the judge does no more than declare it, but it is eſtabliſhed, independently of his miniſtry, from the commencement of the inſanity.

It is not the ſame with regard to a prodigal. Although the cauſe of his interdiction is founded on a natural reaſon, which does not ſuffer the deſtiny of a family to be placed in the hands of a man, who only poſſeſſes his property to deſtroy it, and who only uſes it to abuſe; yet as this reaſon does not produce an abſolute incapacity, it is neceſſary that natural law ſhould be confirmed by civil; and until the miniſtry of the judge has determined the ſtate of the prodigal, he may ſtill enjoy the liberty which is common to all men.

This difference, which does not require to be proved, is clearly ſtated in the firſt and ſecond ſections of the Inſtitutes; *quibus non eſt permiſſum facere teſtamentum.*

A madman, ſays *Juſtinian*, from the moment he is in that condition, cannot make a teſtament any more than an infant; the one has loſt his judgment, the other has not yet attained it; *teſtamentum facere non poſſunt impuberes, quia nullum eorum animi judicium eſt; item, furioſi, quia mente carent.*

But a prodigal only loſes this power, from the time when he is deprived of the adminiſtration of his effects; *prodigus cui bonorum ſuorum adminiſtratio interdicta eſt, teſtamentum facere non poteſt; ſed id quod ante fecerit quam interdictio bonorum ſuorum ei fiat, ratum eſt.*

What is the natural conſequence to be deduced from this firſt principle, the truth of which is recogniſed by all the doctors, who have written upon theſe ſubjects? When it is pretended that a teſtament is null, on account of the incapacity of the perſon mak-

ing it, it is neceſſary to diſtinguiſh between a madman and a prodigal.

With regard to a prodigal, if the teſtament is prior to the interdiction, his diſpoſition cannot be impeached. It would be in vain to offer any proof that the cauſe of his interdiction, that is, his prodigality, his diſſipation, and the diſorder in his affairs exiſted previous to the teſtament, ſince even if all this were eſtabliſhed, the teſtament would ſtill be ſafe; however certain they might be, they might ſerve as the foundation of an interdiction, but could not operate as ſuch in themſelves.

On the contrary, when the queſtion relates to the teſtament of a madman, although it was made before his interdiction, the cauſe of the teſtamentary heirs is not yet ſecure; and ſince the ſtate of madneſs muſt neceſſarily precede the interdiction, which is only a declaration of it; and as the madneſs is in itſelf ſufficient to deſtroy the teſtament, it is competent to offer a proof of this fact; the reaſon is evident; it is the fact, the madneſs itſelf, which as it were pronounces the interdiction.

In a word, prodigality, however certain it may be, does not ſuffice to render the prodigal incapable. Madneſs, if certain and evident, is a complete interdiction in itſelf.

Hence it ariſes that in regard to the one, a proof by witneſſes is rejected, becauſe the interdiction in the caſe of the prodigal, is more a matter of law than of fact; and as it can only be eſtabliſhed by a judicial ſentence, it can only be proved by the ſentence itſelf; whilſt on the other hand, in the caſe of a madman the interdiction is more a matter of fact than of law, and conſequently it may be proved by all arguments, which are received to eſtabliſh the truth of facts, of whatever nature they may be.

Thus, in regard to prodigals, there is only one kind of interdiction; which is that pronounced by the judge, but with regard to a madman, there is as it were a double interdiction and a double incapacity, the one natural and the other civil; and although the firſt is neither ſo ſolemn nor public as the ſecond, it is nevertheleſs the moſt ſtrong, or rather it is the only real one, ſince the ſecond only follows and imitates the firſt; and the magiſtrate ſeems only to interpoſe his judgment, in order to join the authority of the law to that of nature.

The ſecond interdiction, which we call civil, can only be proved by writing, that is by the judgment itſelf, which declares rather than forms it; the firſt, on the contrary, can rarely be proved by writing, and conſequently it may and ought to be proved by witneſſes.

If this firſt principle, drawn from the compariſon we have made between

between a madman and a prodigal, is oppoſed on account of its being impoſſible to admit ſuch proof, without attacking the firſt elements of the law and of the ordonnances which do not ſuffer the authority of written acts to be impeached by parol evidence; we conſider it to be eaſy to anſwer this objection, by a diſtinction equally ſolid with the firſt, and which we aſſume as a ſecond principle that cannot be called in queſtion.

There are two things to be conſidered in all kinds of acts, and moſt particularly in teſtaments.

The firſt is the ſubſtance of the act, the diſpoſitions which it contains, and we may add its form and ſolemnity.

The ſecond, is the capacity of the perſon executing it; in a word, we either confine our attention to the act conſidered in itſelf, or we contemplate the perſon who has ſigned it.

When there is nothing before us but the act, when there is no queſtion but of the truth of what it contains, then it may be admitted as a general rule, that parol evidence cannot be admitted in oppoſition to what is contained in an authentic act, and that for two reaſons; firſt, the common maxim, that parol evidence can never be put in competition with written, when the queſtion relates to a matter which may be the ſubject of a written act; and ſecondly, becauſe the proof is perfect by the act itſelf.

Thus for example, when they have omitted to ſpecify upon a teſtament, that it was read a firſt and ſecond time; dictated, &c. (*lu*, *relu*, *nommé*, *dicté*, &c.) it would be to no purpoſe to demand a liberty to prove that all this had been actually done, becauſe public utility requires that the proof of a fact of this kind ſhould not be ſought for elſewhere, than in the teſtament itſelf.

But when they do not ſtop at the ſubſtance and ſolemnity of the act, when they call in queſtion the power, the capacity, the condition of a teſtator, who can contend, that nothing but the act itſelf can be a legitimate proof of this? Shall it be ſaid that when a queſtion is made, whether a man was a major or a minor, at the time of entering into an engagement, you ſhall only conſult the act itſelf which he has executed, and if he there makes a falſe declaration, ſhall he be bound by that falſehood, becauſe it is written in an act? Shall you not rather ſeek in the public regiſters, for the proper proof of the fact in queſtion; and if thoſe are loſt, ſhall not the minor be admitted to prove even by parol evidence, that he was ſuch at the time of entering into the contract?

In a word, no two things can be more diſtinct and ſeparate than the truth of the act, and the capacity of the party executing it; the one is certain, inconteſtible, proved by the act itſelf; but with regard to the other, the act ſuppoſes it, and does not prove it, unleſs

it

it ſhall be ſaid that the notary is the judge thereof, and that, although he is no more than the inſtrument, the organ, the interpreter of the teſtator, he is nevertheleſs to decide upon his ſtate and capacity.

But if this propoſition cannot be ſuſtained, if your judgments have permitted a proof of the incapacity of a teſtator, even where the notary has ſet down, that he was of ſound underſtanding, what ought we to decide in the preſent caſe, where theſe words do not occur, and where the notary only ſpeaks of the ſoundneſs of body, and ſays nothing of that of the mind? Although no conſequence might be drawn from this omiſſion, to raiſe a preſumption of inſanity, for all the reaſons that have been ſtated to you; it ſerves nevertheleſs to remove the ſcruple which ſome authors have had, where the notary has declared that the teſtator was of ſound mind and underſtanding.

But not to dwell upon a fact of this quality, let us return to the train of principles which we think ought to be eſtabliſhed for the deciſion of this ſecond part of the cauſe.

The teſtament, conſidered in itſelf, is not then a proof of the capacity of the teſtator, the notary is not a judge of it, and how ſhould he, as he only ſees the teſtator for a moment? Can he penetrate, in an inſtant, into the bottom of his heart and the ſecrets of his ſoul? Folly and wiſdom are equally inviſible, if conſidered in themſelves; they are only diſcovered by words and external actions, and thoſe actions are frequently ſuſpended for a much longer time than is neceſſary for making a teſtament.

Let us conclude then, ſince the capacity of the teſtator is as it were an extrinſic fact, and foreign to the act itſelf, of which the notary cannot be the judge, that the teſtament alone is not ſufficient to exclude a proof by witneſſes; becauſe, in a word, it is not preciſely the act which is attacked, but the perſon of the teſtator, and if the teſtament is attacked, is it only indirectly and conſequentially.

It was perhaps with reference to the proof of this capacity of the teſtator, that the firſt *Roman* laws required ſuch ſcrupulous ſolemnities in the execution of teſtaments; it was not ſolely to render them more authentic, that they required them to have the whole *Roman* people as witneſſes. It was alſo to render the capacity of the teſtator entirely certain by the teſtimony of all his fellow citizens, who would have ſtood up to oppoſe the act of the teſtator, if they had not recogniſed his ſanity and capacity.

But after teſtaments became ſecret and domeſtic, and as the preſence of two notaries, or of one notary and of two witneſſes is ſufficient with us to render them authentic, it cannot be ſaid

that ſo ſmall a number of witneſſes, who do not know the teſtator, and who are perhaps ſtill leſs known by him, ſhall exclude the admiſſion of a more ſolemn and perfect proof.

When once the condition of the teſtator is juſtly doubtful, it is proper that a great number of witneſſes, who may be heard with reſpect to a fact of this kind, ſhould ſupply what it left ſhort in the act itſelf, and that they ſhould, after the death of the teſtator, do what the whole *Roman* people, in witneſſing the teſtament, formerly did in his life, by proclaiming aloud the madneſs or ſanity of the teſtator.

All the doctors have unanimouſly followed this opinion, and not one has been cited who has offered to combat it.

Your judgments have confirmed it upon many occaſions, as they have been obliged to admit on the part of *Madame de Nemours*. But they contend, and we believe with juſtice, that it ought not to be taken as a ſettled maxim, that proof by witneſſes ſhould never be refuſed.

The diverſity in your judgments upon this ſubject will be ſufficient to eſtabliſh the real maxim that ought to prevail in the deciſion of theſe queſtions. There are judgments which admit it, and that is ſufficient to ſhew in general, that ſuch proof is often admiſſible; there are others, which reject it, and conſequently ſhew that it is not always admiſſible.

Let us then aſſume it as a certain truth, upon which perhaps we have been too diffuſe, that it is in general a perverſion of maxims, to contend that parol evidence ought to be rejected, on account of the common rule *contra ſcriptum teſtimonium non-ſcriptum teſtimonium non admittitur*.

Such were the principles that we had the honour to propoſe to you in the cauſe of *Bonvalet*, and it was only on account of particular circumſtances, that we thought it would not be proper to allow a proof by witneſſes, of the inſanity of the teſtator.

Let us examine then the particular circumſtances, and the important preſumptions which in this cauſe are oppoſed to theſe general maxims.

We may diſtinguiſh two kinds, the one are derived from the teſtament itſelf, the other from the contracts and other acts, which precede, accompany, and follow it; but before we enter upon this examination, it will be proper to make an obſervation which is general and common to all theſe preſumptions.

You are not now called upon to decide what was the real ſtate of the *Abbé d'Orleans* when he made his teſtament, you are not obliged to pronounce upon the proofs alleged on the one part, or on the other, whether to prove his ſanity or inſanity; that is not the

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it ſhall be ſaid that the notary is the judge thereof, and that, although he is no more than the inſtrument, the organ, the interpreter of the teſtator, he is nevertheleſs to decide upon his ſtate and capacity.

But if this propoſition cannot be ſuſtained, if your judgments have permitted a proof of the incapacity of a teſtator, even where the notary has ſet down, that he was of ſound underſtanding, what ought we to decide in the preſent caſe, where theſe words do not occur, and where the notary only ſpeaks of the ſoundneſs of body, and ſays nothing of that of the mind? Although no conſequence might be drawn from this omiſſion, to raiſe a preſumption of inſanity, for all the reaſons that have been ſtated to you; it ſerves nevertheleſs to remove the ſcruple which ſome authors have had, where the notary has declared that the teſtator was of ſound mind and underſtanding.

But not to dwell upon a fact of this quality, let us return to the train of principles which we think ought to be eſtabliſhed for the deciſion of this ſecond part of the cauſe.

The teſtament, conſidered in itſelf, is not then a proof of the capacity of the teſtator, the notary is not a judge of it, and how ſhould he, as he only ſees the teſtator for a moment? Can he penetrate, in an inſtant, into the bottom of his heart and the ſecrets of his ſoul? Folly and wiſdom are equally inviſible, if conſidered in themſelves; they are only diſcovered by words and external actions, and thoſe actions are frequently ſuſpended for a much longer time than is neceſſary for making a teſtament.

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ſtate of the cauſe. If you were under the neceſſity of pronouncing to day upon the validity of this ſecond teſtament, if you could neither expect nor hope for any further elucidation of the facts which are doubtful, obſcure, and equivocal in this cauſe, then you would not have to look for what was certain, but muſt ſatisfy yourſelves with that which appeared leaſt doubtful; for want of a clear and evident truth, it would be neceſſary to take up with a glimmering appearance of it; not being able to find convincing proofs, you would be reduced to the neceſſity of looking for conjectures, and under the impoſſibility of certainly diſcovering the true, muſt reſt ſatisfied with the probable; but ſo far are you from being in that ſituation, that permiſſion is demanded to bring proofs of an inſanity, which was complete, glaring, and generally known to all who approached the *Abbé d'Orleans*.

Thus on the one ſide, it ſeems ſufficient for the party requiring to be let into his proofs, if he can ſhew that the cauſe is doubtful and obſcure, if he can combat facts by facts, if he can weaken the proofs, extenuate the preſumptions, diminiſh the force and weight of the inductions and conjectures that are oppoſed to him.

If he can go ſo far as to ſhew, that all the arguments on the part of *Madame de Nemours* are not invincible, that the acts, the letters, the conduct of the *Abbé d'Orleans*, in a word, that all the circumſtances of the cauſe may be interpreted in his favour, not indeed in a manner abſolutely deciſive, but at leaſt capable of balancing the interpretations of *Madame de Nemours*; we cannot, without injuſtice, withhold from him a proof, which only tends to aſſure the preſumptions of the one party or the other, to fortify their arguments, and to give to the truth that character and evidence which it at preſent wants.

On the other ſide, it is not ſufficient for *Madame de Nemours*, to ſhew that her arguments have more force than thoſe of the *Prince de Conty*, that her preſumptions are ſtronger and her conjectures more probable. That would be ſufficient, if you were obliged to decide the cauſe as it at preſent ſtands, but ſhe muſt further ſhew, that her proofs are of ſuch a nature that they exclude all proof or preſumption to the contrary, that it is impoſſible to explain, or even to ſuppoſe, the facts adduced by her, without concluding certainly, invincibly, inconteſtibly, that the *Abbé d'Orleans* enjoyed a full liberty of mind; and that it would be uſeleſs to admit a proof of his pretended inſanity, ſince ſuch proof would not only be impoſſible but is already repelled, by the force and evidence of the arguments of *Madame de Nemours*.

Without doing that, ſhe may render the cauſe doubtful, obſcure,

ſcure, uncertain, but ſhe will not render it more favourable for herſelf; on the contrary, it ſeems that ſhe will thereby labour rather for the *Prince de Conty* than againſt him. This doubt, this obſcurity, this uncertainty, is preciſely what ought to induce you not to confirm at preſent, the firſt will in favour of the *Prince de Conty*, but merely to allow him to go into a proof by witneſſes.

Such, Sirs, is the only point, to which this cauſe is at preſent reduced; ſuch is the rule by which, we think, it will be proper to judge of the preſumptions that we are now to examine. If they exclude all reaſonable doubt, we may conclude at preſent that it will be proper to reject the proof. If they leave yet great room for doubt, if the arguments of *Madame de Nemours* herſelf become preſumptions againſt the ſanity of the teſtator, then we are clearly of opinion, that the natural effect of ſuch doubt is to inſpire a wiſh for enlightening it, by a proof which will be equally juſt and neceſſary.

After having made this firſt reflection, which applies equally to all the preſumptions that we are to examine, let us enter firſt, into thoſe which are borrowed from the teſtament itſelf.

This teſtament, you are told, bears the marks of the perfect capacity of the teſtator; the wiſdom and favour of his diſpoſition are invincible obſtacles, inſuperable barriers, to the pretenſions of the *Prince de Conty*.

The wiſdom is allowed; there is neither obſcurity, nor ſingularity, nor contradiction in any of the clauſes of this act; he rewards his domeſtics, he gives the remainder of his fortune, to the *Comte de St. Pol* his brother; could reaſon and wiſdom themſelves have made a more judicious diſpoſition?

The favour of this diſpoſition is not leſs certain, it only tends to reſtore things to their natural ſtate; what can be more favourable than a return to the common diſpoſitions of the law; the law itſelf, which gives the property to the neareſt relations, is not more wiſe or favourable than this teſtament.

If the heirs by blood are ſometimes admitted to a proof by witneſſes, in oppoſition to a teſtament which deprives them of a ſucceſſion deſtined for them by nature, it is unprecedented to extend this privilege to ſtrangers; ſuch are the preſumptions which *Madame de Nemours* borrows from the teſtament, and which, by their importance, deſerve to be examined with attention.

It muſt be agreed that the wiſdom of a teſtament is, without doubt, a very ſtrong preſumption of the ſanity of a teſtator. It was upon the authority of this preſumption, that the ſenate of *Rome* formerly confirmed a teſtament made by a perſon in a ſtate of inſanity; becauſe there was nothing unreaſonable in his diſpoſition.

tion. They fairly preſumed that it was made in a lucid interval, and they forgot the certain madneſs of the teſtator, in contemplating the good ſenſe of the teſtament. It was upon a ſimilar colour that the emperor *Leo*, the philoſopher, decided in his 39th Novel, that the teſtament of an interdicted prodigal ought to be executed, provided it contained nothing unworthy of the character of a man of prudence.

But however favourable this preſumption may be, it has not thoſe characters which are neceſſary to form an invincible preſumption, capable of excluding all proof to the contrary; there is no law which preciſely authorizes it, and beſides it is founded upon a fact which has not an eſſential and neceſſary connection with the ſanity of the teſtator. Upon what is it founded? Upon this ſingle reaſoning, the teſtament is wiſe, therefore the perſon that made it is ſo likewiſe; but it always remains to examine who it was that made it, whether it is the real production of the teſtator, or whether it may be ſuſpected that any other has had a hand in it. In a word, before you prove the ſanity of the teſtator by the teſtament itſelf, you muſt begin by eſtabliſhing that the teſtament was made by the perſon whoſe name it bears, which this the teſtament alone can never prove.

What then is the force, what is the natural effect of this preſumption? So far from excluding proof, it is this preſumption itſelf which eſtabliſhes the neceſſity of it, ſince if the teſtament contained diſpoſitions that were abſurd, impoſſible, extravagant, no other proof is neceſſary to deſtroy it.

If proof is neceſſary, it is principally where the diſpoſition of the teſtator contains nothing contrary to reaſon, and all the favour of this preſumption is reduced to obliging the perſon who conteſts it, to prove the inſanity of the teſtator; whereas if the teſtament itſelf roſe up againſt its author, if it was the firſt witneſs of the weakneſs of his mind, it would be for the teſtamentary heir to prove the ſanity of the teſtator.

This diſtinction is clearly marked by two preciſe laws, which eſtabliſh the principle that we have propoſed.

In the one, the diſpoſition of the teſtator was palpably abſurd, he commanded his heirs to throw his aſhes into the ſea; it was demanded, whether the heir ſhould be obliged to accompliſh this condition, to which the juriſt anſwered, that they ought to begin with examining whether the teſtator was in his ſenſes, when he impoſed upon his heir a condition ſo contrary to the dictates of piety: but that if the heir could diſſipate this ſuſpicion by ſolid proofs, he ought to be admitted to the ſucceſſion without being obliged to obey this abſurd direction. *Hoc prius inſpiciendum eſt ne homo, qui talem conditionem*

conditionem poſuit, neque compos mentis eſſet. Igitur, ſi perſpicuis rationibus hæc ſuſpicio amoveri poteſt, nullo modo legitimus heres de hereditate controverſiam facit ſcripto heredi. L. 27. ff. de condit. inſtitut.

In the other, on the contrary, a father had made a ſenſible diſpoſition, which his ſon could only impeach on the ground of inſanity. The emperors, *Diocleſian* and *Maximian*, ſubjected him to the neceſſity of proving this fact; *adſeverationi tuæ mentis eum compotem fuiſſe negantis fidem, adeſſe probari convenit. L. 5. cod. de codicil.*

Let us add to theſe reflections and authorities that, notwithſtanding theſe reaſons, it would perhaps be difficult to attack the teſtament of the *Abbé d'Orleans* by parol evidence, if this diſpoſition had been olographic.

The preſumption would then be entirely in favour of the ſanity of the teſtator, we ſhould ſay, as in the caſe of *Bonvalet*, where we found this important circumſtance, that it is difficult to conceive a perſon who has loſt his underſtanding, to have ſufficient patience, docility, and ſubmiſſion, to write with his own hand a teſtament, containing a long train of diſpoſitions. Although it might perhaps be dangerous to decide in general, that proof of inſanity ſhould never be admitted againſt an olographic teſtament, which contains nothing inconſiſtent with ſenſe and reaſon, it muſt be at leaſt confeſſed, that this proof ſhould only be allowed very rarely, and under very particular circumſtances.

But does the queſtion here relate to an olographic teſtament, as in the caſe of *Bonvalet*, and a teſtament in which the teſtator made a kind of inventory and exact memorial of his property, to a teſtament bearing the manifeſt ſigns of intention, of ſanity, of capacity? We have here nothing but his mere ſignature, it is the only part which the act itſelf proves that he had in it, the reſt is a preſumption which may be combated and frequently deſtroyed by other preſumptions.

Thus all who have examined the force and authority of this conjecture, which is derived from the good ſenſe of the teſtament, have entered into this diſtinction. Even thoſe who have been cited on behalf of *Madame de Nemours*, that is to ſay, *Mantica* and *Boerius*, regard the good ſenſe of the teſtament as a mere preſumption, which, to make uſe of their expreſſions, *rejicit onus probandi in adverſarium*, and the only principle which we can follow upon this ſubject, becauſe it is the only one that is equally ſupported by reaſon and authority, is included in this propoſition.

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Either the teſtament contains wiſe and judicious diſpoſitions, which induce a preſumption of the ſanity of the teſtator, and then it is for the party impeaching it, to prove that he was in a ſtate of inſanity at the time of making this diſpoſition.

Or on the contrary, the teſtament itſelf induces very ſtrong ſuſpicions of weakneſs and derangement, and then it is incumbent on the inſtituted heir, to ſupport his title by proving the ſanity of the teſtator.

Without adding any thing further upon this firſt point, let us proceed to the favour of the inſtituted heir, and examine if it is more capable, in its principle, of precluding the demand of the *Prince de Conty*.

We may in the firſt place aſk whether it is true, that you have to decide between the *Prince de Conty* on the one ſide, and an heir by blood, inſtituted in the teſtament of the *Abbé d'Orleans*, who unites in her perſon, the choice of the teſtator with the deſtination of the law, and in this double character is entitled to particular favour, on the other.

Is it the *Comte de St. Pol* who propoſes this argument? He would doubtleſs have united theſe two qualities. He would have been heir by the law of nature, and alſo by the law of the teſtator. But he died a long time before the *Abbé d'Orleans*, and with him expired that favour, which was particular to himſelf. *Madame de Nemours* has not ſucceeded to that prerogative which diſtinguiſhed the *Comte de St. Pol* from every other heir by blood. She was not appointed by the will of the teſtator, and if the laſt teſtament ſhould operate to her advantage, it is only on account of the clauſe which revokes the firſt; ſhe can only be conſidered here, as a legitimate heir who would deſtroy one teſtament by another, by ſhewing that the *Abbé d'Orleans* died without a teſtament, and conſequently that the ſucceſſion belongs to her.

Thus this favour towards the heir by blood, which is ſo much relied upon, is the ſame thing with the prudence of the teſtament; and the argument is preciſely the ſame with that which we have juſt examined. It could only have a different character in the mouth of the *Comte de St. Pol*.

But ſuppoſe he had propoſed it himſelf, and that he had propoſed it with that double favour which would have been peculiar to himſelf; would it have been ſo efficacious as is contended on the part of *Madame de Nemours*?

We might ſay here, that it is ſurpriſing that ſo imperious an argument was never foreſeen either by *Menochius* in his treatiſe on Preſumptions, or by *Mantica* in his treatiſe on Conjectures for the interpretation of laſt Wills; and that it has not been found poſ-

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ſible to find out any authority, in ſupport of what is ſtated as ſo inſuperable a bar. We may even aſk thoſe who allege it, what is the reaſon of this ſilence; we may add, in order to put this difficulty in a ſtill clearer point of view, that nothing is ſo common with theſe authors, as the general and ordinary preſumption, in favour of the heirs by blood. Thus for inſtance, in order to examine the force of a derogatory clauſe, they inquire what is the quality of the heirs inſtituted in a teſtament, where this clauſe is not contained; and ſome of them go ſo far, as to have it implied, if the heirs by blood are appointed by the ſecond teſtament.

We might adduce an infinite number of ſimilar examples, and after this obſervation we might always aſk, why this preſumption, which is ſo common, ſo natural, ſo favourable, has been ſo generally overlooked by all the writers upon the ſubject?

What can they anſwer, without intirely rejecting the principles of reaſon, except that there are no two queſtions more different, than the will of a teſtator and his capacity; in the firſt, a perſonal favour towards the heir may be urged with ſucceſs, and as that is greater with reſpect to heirs by blood than others, it is a circumſtance which may be fairly adduced to demonſtrate the force and efficacy of the teſtator's intention. In the laſt, on the contrary, this favour is impotent, and this circumſtance is uſeleſs; becauſe before you examine what was the will of the author of the teſtament, and what ought to be the juſt interpretation of it, you muſt begin by eſtabliſhing that he had a will; that he was capable to will, to diſpoſe, to ordain. Now this capacity is abſolutely independent of the name and quality of thoſe who appear to have been the objects of his diſpoſition. When the only queſtion is as to the degree of will, it may eaſily be preſumed that it was ſtronger in favour of the heirs by blood than of ſtrangers. But when you are inquiring into the exiſtence of a will, then the favour towards the heirs cannot form any inſuperable preſumption, becauſe it is evident, that though you may ſupply in favour of the heirs by blood, a defect of expreſſion or ſolemnity, nothing can ever repair, even with reſpect to them, an abſolute defect, an entire abſence of will.

But let us go further, and judge of the truth of this maxim, by its conſequences.

If it was once received into practice, that you ought to decide upon the ſanity or inſanity of a teſtator, upon a principle of favour towards the heirs whom he appears to have choſen, what inconvenience, what abuſe would not the public have reaſon to apprehend in future, reſpecting the teſtaments of perſons of doubtful capacity? Will it be difficult to lend the aid of another's will to a

man whom the exceſs of diſeaſe, the approach of death, or a ſettled inſanity have deprived of the uſe of his own? Will there be wanting means to compoſe with art, a wiſe and judicious diſpoſition, to which the teſtator, either from ſurpriſe or weakneſs, has contributed nothing but his ſignature? And if any one of the legitimate heirs is inſtituted in this teſtament, in vain will the laws have decided, that a perſon deſtitute of underſtanding is incapable of dictating an inviolable law to his poſterity; in vain will natural reaſon have inſtructed all men, that inſanity is a fact which can hardly ever be proved except by witneſſes; to reaſon and to law, they will oppoſe the objection, that the teſtament is wiſe, and that there is an heir by blood, the principle of favour to whom ſhall ſupport the whole of the diſpoſition.

Let us even admit that this argument might be conſiderable, if there was only one teſtament.

But the caſe here is very different, the teſtator has made a former teſtament, in which he had inſtituted heirs, not leſs favourable than in the laſt; the *Comte de St. Pol* was as much appointed in that as in the ſecond, *Madame de Longueville* was next to him, and finally, the *Princes de Conty*.

The principle of favour then is equal on the one ſide and on the other. If *Madame de Nemours* pretends, that the laſt teſtament ought to be ſupported merely on account of the name of the *Comte de St. Pol*, the *Prince de Conty* may anſwer, that that name is at the head of the firſt teſtament, and that the favour is augmented by the name of *Madame de Longueville*, alſo heir by blood and mother of the teſtator. If it is ſaid, that the heirs indeed were equally favourable, but that they had more intereſt in the ſubſiſtence of the laſt teſtament, becauſe by that the *Comte de St. Pol* was not charged with any ſubſtitution; it is on the contrary preciſely for that reaſon, that the firſt teſtament is the more favourable of the two.

The firſt effect of this ſubſtitution is to appoint *Madame de Longueville*, and to join, as we have ſaid, the principle of perſonal favour towards her, to that for the *Comte de St. Pol*.

The ſecond is to tranſmit the property to the *Princes de Conty*; and might not the teſtator, who ſaw that *Madame de Nemours* had no children, and that even if ſhe ſhould have any, they would not bear his name, naturally wiſh that his property ſhould belong to Princes, whoſe illuſtrious name would ſo well accord with the ſplendour and dignity of his own?

If then the ſecond teſtament is more favourable than the firſt, with regard to the intereſt of the heirs by blood; the firſt is more favourable than the econd, by the wiſhes and inclinations of the

teſtator; and in this conflict of oppoſite favour, ſhall it be allowed that the favour of the heir is ſo great, as to be abſolutely triumphant over that of the teſtator? And under what circumſtances? At a time, when you are not inquiring in a caſe of doubt, which teſtament ought to be preferred, but are only to decide whether it ſhall be permitted to remove this doubt, to diſſipate theſe clouds, to throw light upon a cauſe which is obſcure, doubtful, and uncertain.

In ſhort, without going into any longer diſſertations, this queſtion ſeems to be preciſely decided by the laſt law, *ff. de injuſto rupto*. A teſtator had made a teſtament by which he had inſtituted ſtrangers, as his heirs. He fell into a ſtate of inſanity, and broke the tables of his teſtament, *tabulas (teſtamenti) incidit*; the heirs by blood maintained that the teſtament was *de jure* revoked, the inſtant the teſtator himſelf had lacerated it; the inſtituted heirs contended that the teſtator had fallen into a ſtate of inſanity, and made this laceration in one of the paroxyſms of his fury; the juriſt decided, that if the fact was ſo, the teſtament was not revoked.

You ſee then, Sirs, that the preſumptions which reſult from the act itſelf, may very well impoſe upon the *Prince de Conty*, the neceſſity of making the proof which he demands, but can never debar him from the right of doing ſo.

Let us examine, however, whether the other preſumptions, which are as it were exterior to the teſtament itſelf, are inconteſtible proofs of the ſanity of the *Abbé d'Orleans*, and let us always remember the important reflection with which we ſet out, that in order to give theſe preſumptions the character of certainty which is neceſſary, they are not only to be ſuch as are probable, but they muſt, at the ſame time, be ſufficient to exclude all reaſonable and legitimate doubt.

In order to examine them more diſtinctly, permit us to make a ſuppoſition, which may throw conſiderable light upon this laſt part of the cauſe.

Having conſidered the inductions drawn from the teſtament itſelf, let us ſuppoſe, for a moment, that this teſtament now ſtood alone, detached from the other acts which accompany it, deſtitute of their aſſiſtance, and without any other ſupport than its own good ſenſe and favour. And let us ſuppoſe, that under theſe circumſtances, the *Prince de Conty* had offered to prove, both by writings and witneſſes, the imbecility and weakneſs of the teſtator's mind, would the deciſion of the cauſe in that caſe be very difficult?

We obſerved at the outſet, that it would be proper to diſtinguiſh three periods in the life of the *Abbé d'Orleans*, a firſt period of certain and undiſputed ſanity, which terminated a ſhort time after his

emancipation; a ſecond period of inſanity proved, admitted, perpetual, ending only with his life, and this ſecond period, by the confeſſion of *Madame de Nemours* herſelf, beginning about the month of *October*, 1671; a third period, full of darkneſs and obſcurity, interpoſed between the other two; it is this interval between ſanity and madneſs, which *Madame de Nemours* would add to the period of ſanity, and the *Prince de Conty*, to that of madneſs.

And after having diſtinguiſhed theſe three periods, we ſhall obſerve, that whether we conſider what preceded this doubtful interval, or direct our attention to what followed it, it will be difficult not to conceive violent preſumptions capable of authorizing, and even in ſome degree of anticipating a proof by witneſſes.

And what would theſe preſumptions be?

We ſhould repreſent to you at firſt, a man who, according to the language of *Madame de Nemours* herſelf, had received from nature a ſimple mind, low inclinations, a particular humour, a ſordid avarice, a levity, an inconſtancy, an inſtability, which could only be ſatisfied by continual journies, equally uſeleſs to himſelf, and inconſiſtent with the dignity of his birth. A man reducing himſelf by a vile contemptible intereſt to the ſtate of his ſervants, who only bore the name of *Longueville*, in order to diſhonour it in every place where he was carried by his inconſtancy, and who, doing juſtice upon himſelf, relinquiſhed that great name of which he was unable to ſupport the dignity, in order to aſſume the unknown name of *Meru*; a man who entered into his *Noviciate* with the *Jeſuits*, and who relinquiſhed it almoſt immediately afterwards; who engaged in holy orders, againſt the opinion of and in oppoſition to his mother, who thought him incapable of ſo ſacred a function.

Let us continue the portraiture of his character without adding a ſingle trait that does not proceed from the hand of *Madame de Nemours* herſelf, either in her defences, or in the pieces ſhe has adduced. Let us join then to theſe marks of a natural weakneſs of mind in *M. de Longueville*, what you have been told reſpecting his firſt teſtament, that he did not know whether his ſucceſſion would belong, after his death, to his relations or his friends. This point appeared ſo conſiderable to thoſe who propoſed it, that they are not content with mentioning it in their pleadings, but have alſo included it in their printed papers. This is not all, for how would they have you conſider the firſt teſtament? As a ſuggeſted teſtament, which could not be the production of a mind ſo ſimple as that of the *Abbé d'Orleans*. Sometimes it is *Mademoiſelle des Vertus*, ſometimes it is the *Sieur Trouillart*, who cauſed him to make it; but it was never the *Abbé d'Orleans* who made it himſelf.

If

If you believe the defender of *Madame de Nemours*, you muſt diſtinguiſh two different parts in this teſtament, the preamble and the diſpoſitions. The preamble, full of ignorance and deranged underſtanding, as the teſtator declares that his principal motive was to prevent the ſuits which his ſucceſſion might occaſion *between his relations and his friends*; the diſpoſitions, which are the work of an enlightened juriſt, perfectly well acquainted with the nature of ſubſtitutions, and in this partition of the teſtament, whatever is full, not only of error but extravagance, is aſcribed to the *Abbé d'Orleans*; and that part which is a work of conſummate prudence and good ſenſe, is regarded as the effect of extrinſic ſuggeſtion.

To proceed, how have they juſtified before you, the diſgraceful ſavings of the *Abbé d'Orleans*? The abſurdity and indignity of all his journies; the obſcurities and degradations that appear in his letters? There is no anſwer upon which they have ſo much relied, as a compariſon between the period of his firſt and of his ſecond teſtament. Is this to juſtify the *Abbé d'Orleans*, at one of theſe periods, or rather to accuſe him in both, if not of a complete inſanity, at leaſt of a great weakneſs of mind, which, in a man of this quality, is not very far from imbecility?

Let us continue to mark the character of the *Abbé d'Orleans*, as it has been traced on the part of *Madame de Nemours* herſelf.

Scarcely was the *Abbé d'Orleans* emancipated, when an affair of importance to him was agitated, the payment of his mother's portion; at a conſultation of the relations, they give him power to tranſact with her upon certain conditions; and at the very time they are making theſe preparations, when they are preſenting a requeſt to the parliament in his name, for the completion of this object, we ſee him ſtart off, upon a ſudden, on an unmeaning journey? We do not dwell upon his avarice which appears throughout. After having ſtaïd nine days at *Orleans*, twelve at *Tours*, and about as long at *Saumur*, without deſign, and without utility; after having run over ſome provinces ſituated on the *Loire*, he takes the reſolution of returning to *Paris*, in the carriage of *Angers*; he takes the ordinary rout, he arrives at *Gué de Loré*, a day's journey from *Paris*, there he finds a valet of the *Comte de St. Pol*; and we ſee him immediately returning upon his ſteps, with ſo much precipitation, that they could hardly find three horſes for him and the two domeſtics who followed him; the reſt of his family continue their route, and arrive at *Paris*; and during this time he returns to *Orleans*, he there ſtays thirty-eight days together in a common inn, living upon 40 ſols a-day, and if he leaves

it, it is for the purpoſe of embarking, on the 29th of *December*, on the *Loire*.

What important affair obliged him to expoſe himſelf to the rigours of winter, and the peril of navigation, at ſo inconvenient a ſeaſon? The deſire of ſeeing the city of *Tours*, which he had already ſeen, where he had ſtaid 12 days, and which he had only left the 23d of *September*, about two months before? He ſtays there 10 days, and returns at laſt to *Paris*, on the 15th of *January*.

We do not dwell on all the circumſtances of theſe journies, but how can they explain that ſudden and unexpected change, which induced him to quit the route for *Paris* to return to *Orleans*, to paſs there 38 whole days, to go afterwards to *Tours*? Was it his buſineſs, or curioſity? But hitherto they have neither been able to diſcover the one, or to render the other probable.

Can any other cauſe then be imagined for this change, than a derangement of mind in the *Abbé d'Orleans*, or a precaution of his family, who avoided as much as they could letting him appear in *Paris* without neceſſity? And becauſe they muſt wait two months for his majority, (a period of which you will obſerve in the ſequel, that they took advantage as ſoon as it arrived,) there is reaſon to preſume that his family found he was returning too ſoon, and left him at liberty to trace back his former ſteps, in order to get through the time, until age, rather than reaſon, would render him capable of entering into contracts.

If we do not ſuppoſe one or the other of theſe reaſons, the fact of *Gué de Loré* appears inexplicable; it is uſeleſs to ſtop and examine, which is the more probable. It might, perhaps, be difficult to prove that the cauſe of this unexpected return was a real madneſs, a frenzy, a wildneſs of mind which nobody could controul; becauſe there is little probability, that if things had come to that extremity, ſo illuſtrious a family would have left the *Abbé* for 38 days at *Orleans* without his principal officers, as is proved by the accounts. But if this firſt reaſon is not ſufficiently eſtabliſhed, we can imagine no other than the ſecond; and this valet of the *Comte de St. Pol*, whom the *Abbé d'Orleans* met at *Gué de Loré*, and at the ſight of whom he diſappeared, makes us very reaſonably preſume, that he brought ſome order of the family, which was the occaſion of the prompt departure of the *Abbé d'Orleans*.

Let it not be ſaid in anſwer to ſo important a fact, that there is a parallel circumſtance in the journey of the former period; for beſides that the anſwer is not advantagous to *Madame de Nemours*, as we have already ſaid, we do not find any ſuch example in all the accounts of that period. We ſee indeed, that the *Abbé d'Orleans*, in

in running over a province, returns many times to the ſame city; but his having taken the reſolution of returning to *Paris*, having followed for 60 leagues, the ordinary route in a public carriage, to within one day's journey of *Paris*, and then, all at once, changing his deſign, ſetting off at the ſight of a domeſtic of the *Comte de St. Pol*, in an equipage ſo little ſuited to his quality of prieſt and *Duke de Longueville*, hiring horſes at one place, and chairs at another, this, once more, is a thing of which we have no example in the whole courſe of his former journies.

Repreſent to yourſelves then, Sirs, a man of this character, in every thing that precedes the time which we have called a doubtful interval, between ſanity and inſanity, but join to it every thing which followed that ſame interval, and what do you then perceive? Two things equally evident. The one is the madneſs, the imbecility, the fury of the *Abbé d'Orleans*. The other, the uncertainty of the time when it commenced.

The firſt cannot be at all doubted, and is the ſecond leſs certain?

Nothing can fix the commencement of the inſanity, if we look at the cauſe, without reference to the written documents.

Every thing which *Madame de Nemours* alleges to aſcertain it, renders it ſtill more uncertain.

She makes uſe of the memorial preſented by *Madame de Longueville*, ſhe alleges the authority of the relations; let us examine whether either the one or the other of theſe proofs is ſufficient. Let us take the very terms of the memorial of *Madame de Longueville*; ſhe ſtates to the king, that the *Abbé d'Orleans*, her ſon, ſeven or eight months after his tutelage was complete, and his attaining his majority, having taken different journies into diſtant countries which had altered his health, he was not in a condition to adminiſter his affairs.

We cannot help obſerving here, the uncertainty, the embarraſſment, the obſcurity of theſe expreſſions, which ſeem at firſt as favourable to the *Prince de Conty* as *Madame de Nemours*; for if the madneſs commenced ſeven or eight months after the tutelage was finiſhed, the teſtament ſupported by *Madame de Nemours* falls within the fatal period which is indicated by this memorial. The tutelage was finiſhed by the emancipation, which was on the 22d of *July*, 1670; the teſtament is of the 26th of *February*, 1671, it is then within the ſeven months ſtated in the memorial.

If on the contrary, we only begin to compute from the day of the majority, the *Abbé d'Orleans* was not really in a ſtate of inſanity, until the month of *Auguſt* or beginning of *September*, 1671.

Theſe two dates are mutually contradictory and deſtructive of each other.

But let us even ſuppoſe, which indeed is the more probable, that *Madame de Longueville* intended to refer to the laſt, then *Madame de Nemours*, who borrows her authority, will not agree with her; and conſequently this authority will only ſerve to render the commencement of the inſanity ſtill more uncertain.

At what time does *Madame de Nemours* contend that the *Abbé d'Orleans* fell into a ſtate of inſanity? It was, according to her, in the month of *October*, 1671; that upon going from *Straſbourgh*, to *Sarrebourg*, an unexpected accident, a ſudden fright, extinguiſhed for ever the light of his reaſon. At what time, on the contrary, does *Madame de Longueville* fix it, according to the explication which *Madame de Nemours* gives to her words? ſeven or eight months after the 12th of *January*, 1670, that is to ſay, the beginning of *September* at lateſt. Suppoſe the eight months to be complete, the time would end on the 12th of *September*, and conſequently one of the letters, which *Madame de Nemours* adduces to prove the ſanity of the *Abbé d'Orleans*, was written during the time of his inſanity, that is, on the 18th of *September*.

There is nothing then more uncertain in this cauſe than the eſſential point, that is to ſay, the commencement of the inſanity.

The report of the relations furniſhes a ſtill weaker conjecture upon this ſubject.

It is true, as you are told, that they make uſe of the expreſſion *preſent infirmities*, but they have not taken notice that the expreſſion is uſed at two different times, in the month of *January*, and in the month of *March*. If the word *preſent* is taken ſtrictly, and we admit the fine ſpun inference which they offer to draw from it, it would follow that the relations have contradicted themſelves, as they make uſe of the ſame term at two different times; and if the word *preſent* in the report given in *March*, excluded all the time that was paſt, they could not have made uſe of it in the month of *January* preceding. But it is clear that this term does not imply any excluſion of the paſt, as we cannot doubt the inſanity of the *Abbé d'Orleans*, from the time that he was confined by the order of the king, which time goes back ſo far as the month of *October*, 1671, and conſequently, this expreſſion is not ſufficient to fix and preciſely determine the time of the commencement of the inſanity.

It is added that there are ſome of the relations who ſay in confirmation of their opinion, that the *Abbé d'Orleans* committed ſome irregular actions in *Germany*, then he had not committed any before, a falſe concluſion ſimilar to the former, a weak and trifling preſumption.

But

But not only is every thing wanting, which can certainly fix the commencement of the inſanity, we may add, that natural reaſon ſufficiently ſhews that we cannot juſtly fix it at the time, when the *Abbé d'Orleans* was put in a ſtate of confinement.

It is uncertain how far it will go back, but it is certain, even now, or at leaſt it is more than probable, that it muſt go further back than that.

Who can believe that upon the firſt indication of folly, they would have proceeded at once to ſuch an extremity, with regard to a perſon of the name and birth of the *Abbé d'Orleans?*

Nothing but an impoſſibility, of concealing this melancholy ſpectacle from the eyes of the public, or a want of prudence and good ſenſe, could oblige a family to take the painful reſolution of proclaiming at once its grief, and its ſhame.

Can the one or the other of theſe ever be aſcribed to ſo illuſtrious a family, as that of the *Abbé d'Orleans?* Shall it be ſaid, that means were wanting to defer ſo painful a diſcloſure, that they could not do that, which every day is done by private individuals, in the moſt obſcure families? Could they not by a ſecret and domeſtic judgment, have confined him for a time, in one of their country manſions?

Shall it be contended that perſons as much elevated above the generality of mankind, by the extent of their underſtanding, as by the grandeur of their birth, would not have thought of taking ſo reaſonable a precaution, as waiting for a delay, which could not be otherwiſe than ſalutary; that they would have wanted prudence or counſel, upon an occaſion when the ſentiments of nature would ſupply the place of prudence, and where natural tenderneſs alone is ſuperior to the wiſeſt counſels.

If neither the power nor the will were wanting upon this occaſion, to the illuſtrious relations of the *Abbé d'Orleans*; can the public doubt, but they would have deferred as long as it was poſſible to throw an indignity upon him, the diſgrace of which would in ſome degree recoil upon themſelves, and that nothing but ſtrict neceſſity, and the deſpair of ever effectuating a cure, would have induced them after every delay, to recur at laſt to the authority of the king, to avow the misfortunes which had happened to them, and to obtain from him a letter *de Cachet*, for the confinement of the *Abbé d'Orleans?* And let it not be ſaid, that this was done, without exciting any notoriety (*eclat*). Can any thing be more doleful for perſons of this rank, than to be obliged to appriſe the king himſelf of their calamity? Could ſuch an order be carried into execution without the public being informed of it; and could they flatter themſelves, that a whole monaſtery would

witneſs in ſilence the madneſs and imbecility of a perſon of this rank; the moſt formal interdiction is leſs notorious than ſuch a remedy; one who is under an interdiction often retains a perſonal liberty; they do not even confine all who are in the condition of imbecility. This ſeverity is only uſed againſt ſuch as are in a ſtate of fury.

Let us combine then all theſe circumſtances; let us recal then every thing which has preceded that doubtful interval, between ſanity and inſanity; the character of the *Abbé*'s mind, his journeys, his extravagant conduct, let us join what followed it, and above all the important remark, that we have nothing as yet to fix the commencement of the inſanity, that on the contrary every thing ſeems to concur in ſupport of the preſumption, that it commenced long before its diſcloſure to the public by the detention of the *Abbé d'Orleans*, and after that is it poſſible to doubt, under all the circumſtances, if nothing appeared but the teſtament itſelf, that a proof by witneſſes ought to be allowed?

If any doubt could be entertained of that, it muſt at the ſame time be decided, that ſuch proof can never be received; that whatever preſumption may be alleged, the teſtament alone will be its own defence, and deſtroy before hand whatever may ſeem adapted to oppoſe its execution.

But if this preſumption is equally abſurd and untenable; if the public has a ſubſtantial intereſt, to oppoſe the ſuppoſition of teſtaments; if the law can never lend its power to a madman, or give the character of a legiſlator to an ideot, it muſt be alſo agreed, that there never could be a ſtronger ground for the admiſſion of proof, than under the circumſtances to which this cauſe is reduced, where we muſt ſee, (which cannot be too often repeated, becauſe it is the deciſive point in the cauſe,) on the one hand, the indiſputable exiſtence of infanity, and on the other the abſolute impoſſibility of fixing the commencement of it by any other proof than the depoſitions of witneſſes.

It remains then only to examine, whether what accompanies this teſtament, can change the ſtate of the cauſe and ſupply its deficiencies, that is to ſay, can inconteſtibly prove that the inſanity had not commenced at the time when the teſtament was made.

We ſhall reduce theſe circumſtances to three principal heads, the ſolemn acts paſſed by the *Abbé d'Orleans*, his perſonal conduct, the judgment and approbation of his family.

We may in the firſt place make two general obſervations, upon all theſe circumſtances.

Firſt, it is a ſelf-evident truth, that ſanity or infanity are two qualities

lities of the mind, equally inviſible with the mind itſelf, and as we do not know the minds of other men, except by their words, or their exterior actions, neither can we diſcover in any other manner, the diſpoſitions of the ſame mind.

But amongſt the actions, which are as it were the natural ſigns of the affection of the ſoul, there are two kinds, the one ſo perſonal, ſo attached, ſo inherent, ſo cloſely united to the perſon, that it is impoſſible to ſuppoſe them to be his without recognizing his ſanity and capacity.

Thus, for inſtance, let a magiſtrate have exactly fulfilled all the duties of juſtice; let him have exerciſed all the functions of his ſtation publicly, wiſely, conſtantly, can it be doubted that in ſuch a caſe he has ſufficient judgment and underſtanding to make a teſtamentary diſpoſition, and could any parol evidence be allowed in anſwer to ſo ſtrong and inſuperable a preſumption?

It would be the ſame with any other public function, exerciſed at the time of making the teſtament. The nature of theſe functions does not permit the action of the perſon who fulfills them, to be ſupplied by the miniſtry of another.

But there are others, of a directly oppoſite kind, which may be the act of another's will, and in which the perſon doing them may be merely paſſive.

Thus, for inſtance, in the caſe of a contract, it may be often contended that the party contributed nothing but his ſignature, the reſt may have been ſupplied by the counſel, the aid, the miniſtry of another; in a word, there is nothing in ſuch an act conſidered merely in itſelf, which is neceſſarily and certainly produced by the mere will of the perſons executing the inſtrument.

The ſecond reflection which is only a conſequence of the firſt, is, that there is a great difference between contracts and teſtaments; the law ſuppoſes the one to be ſo appropriate to the perſons executing them, that the defect of his will can never in any manner be ſupplied, whereas the others do not require an equal degree of diſcretion, of underſtanding, or even of intention.

On the part of *Madame de Nemours*, they have denied this diſtinction between the capacity which is neceſſary to make a contract, and that which the law requires for a teſtament. It is regarded not only as a novel diſtinction, but as one which is contrary to all the principles of law.

But ſo far is it from being novel or unjuſt, that we think it may be ſaid to be as ancient as the ſyſtem of juriſprudence itſelf, and that without it, it would be impoſſible to ſuſtain ſeveral of the moſt inviolable laws.

We ſhall not attempt at preſent to prove it by a long enumeration

tion of all the caſes, in which it is clearly eſtabliſhed; we ſhall only mention two, which are known to every body, and demonſtrated in an invincible manner.

No body is ignorant that even pupils before the age of 14, may make a valid contract, provided it is with the aſſent of their tutor. We do not ſay, that the tutor can oblige himſelf in their name, we ſay, (and it is a principle known to all, who have only read the Inſtitutes of *Juſtinian*,) the pupils might oblige themſelves with the aſſent of their tutor, yet they could not make a teſtament.

But not to travel out of the *French* juriſprudence, can any body doubt, that contracts made by minors are good in themſelves, that they produce a legitimate obligation, and that until they are deſtroyed by letters of reſciſſion, they are to be executed as acts paſſed by perſons of full age? They may engage their property by all kinds of contracts; the laws of the church, and the ſtate, regard them as capable of effectually contracting the moſt important, the moſt ſolemn, and the moſt inviolable of all engagements, ſuch as marriage, and religious profeſſion. Yet at the time that it is permitted to them to diſpoſe not only of their goods and their fortune, but alſo of their perſon and condition, the ſame law declares them incapable of diſpoſing of their effects by teſtament.

Let us add to this firſt example, another proof of the ſame diſtinction, which is not leſs certain or leſs convincing; a perſon may engage by the miniſtry of a procurator, and when the procuration is general he ſo completely adopts the credit of the perſon in whom he confides, that, without knowing it, without expreſsly intending it, he enters into all kinds of obligations; but can any body contend that it is poſſible to make a teſtament by procuration? And whatever confidence a teſtator may repoſe in the probity, and underſtanding of his counſel, could he ſubſcribe to a law not made by himſelf?

The teſtament, if you pleaſe, ſhall be wiſe, reaſonable, full of juſtice and equity; the teſtator ſhall even have approved it before hand, by permitting his counſel to make it; the diſpoſition is null; becauſe a teſtament ought to be not only a judicious act, it ought eſſentially and neceſſarily to be the production of the judgment and reaſon of the teſtator himſelf.

This is not then one of thoſe ſubtle diſtinctions repugnant to natural reaſon, and only ſupported by the mere authority of poſitive law.

We might ſay, that although it is written in every law, it is a law previouſly ordained a law by reaſon itſelf, and therefore it is univerſally received whenever there is any idea of juriſprudence.

But

But what is the natural difference, which produces this diſtinction between contracts and teſtaments? We conceive there is no great difficulty in reſolving this queſtion.

It is eſſential to human ſociety, that there ſhould be contracts. It is not neceſſary that there ſhould be teſtaments; never was there a community ſubſiſting without the aid of ſome engagement. There were many which for a long time refuſed their citizens the authority of making teſtaments. The foundations of civil ſociety, of commerce, of police, of government, would be overturned, if it was rendered difficult to contract engagements; on the contrary, the ſociety, the commerce, the government of ſtates, might ſubſiſt without teſtaments.

The faculty of contracting is conformable to natural law, to the law of nations, to civil law.

The liberty of making teſtaments is an invention of the law of nations, authorized by civil law, but appears contrary to the law of nature, which, by death, deprives a man of all the rights that he could exerciſe over his property.

Contracts are always favoured, teſtaments are often the reverſe, and never was there any juriſprudence, in which that propoſition was more true than the law of *France*.

Such are the natural characters, which diſtinguiſh contracts from teſtaments, ſhall we then be ſurpriſed if the laws have permitted mankind to diſpoſe of their property, more eaſily by a contract than a teſtament?

In a contract the ſlighteſt capacity is ſufficient, becauſe it is conformable to common right, and beſides ſome reliance may be had, in the integrity of a perſon with whom it is made; the party may take counſel and ſign without preciſely knowing the extent of his engagement, by reaſon of the confidence which he places in the probity, the underſtanding and experience of thoſe whom he conſults.

But in a teſtament, it is neceſſary that this underſtanding, this experience, this capacity, ſhould belong to the perſon who makes it. It is not indeed forbidden to a teſtator to uſe the aſſiſtance of counſel; but ſuch counſel only regards the form of the act, and not the ſubſtance. It is for the teſtator to think, to deliberate, to examine, to conſult himſelf, to interrogate himſelf, in one word, TO WILL: the lawyer only gives him his advice, in order to lend to his thoughts the expreſſions of the laws, and to join the exterior form to the matter and ſubſtance of the act, which ought to be produced by the ſole will of the teſtator.

After having made theſe general reflections upon contracts, and other actions, by which the ſanity or inſanity of a teſtator may

be

be proved, let us examine what is the inference that may be drawn from the different acts which were executed by the *Abbé d'Orleans*.

Recollect, if you pleaſe, all the circumſtances of time and manner, in which theſe inſtruments were executed.

THE TIME.

1. The majority of the *Abbé d'Orleans*, which he attained on the 12th of *January* 1671; the firſt act is of the 16th, on the return from that journey upon which the incident of *Gué de Loré* took place.

2. The whole interval of time in which he exeeuted 21 acts, from the 15th of *January*, to the 6th of *March*, is only two months and ten days. He ſeems to have only returned for the purpoſe of executing them. He had ſcarcely arrived when he ſigned the firſt; he had ſcarcely ſigned the laſt, when he ſuddenly departed.

THE MANNER.

We may conſider them at firſt, in general, and afterwards examine them in particular. When we conſider them in general, the firſt glance will be ſufficient to ſhew, that they all tend to two different objects.

The one to regulate whatever might relate to *Madame de Longueville*.

The other entirely to ſtrip the *Abbé d'Orleans*.

The firſt of theſe deſigns was executed by the tranſaction of the 16th of *January*, and the contracts for the annuities accompanied it, in which we ſee the *Abbé* giving away 4000 livres, and relinquiſhing ſeveral eſtates for the payment of *Madame de Longueville*.

It may be alſo ſaid, that it was executed by the tranſaction with the *Prince de Condé*, which only regards the payment of the arrears of the portion.

Finally, it was executed by the donation to the *Comte de St. Pol*, in which there are three important clauſes, that relate ſolely to the intereſt of *Madame de Longueville*.

The firſt, is the obligation impoſed on the donatary, to execute all the acts which the *Abbé* had paſſed with his mother, for the payment of her portion.

The ſecond, the obligation of confirming the diſcharge which he had given her for the furniture, and jewels contained in the inventory.

The third, the obligation to diſcharge her from an account of the tutelage.

The

The ſecond deſign, to wit, that of ſtripping the *Abbé d'Orleans* of all his property, appears manifeſtly:

1. In the univerſal donation.
2. In the particular donations, to ſome of the domeſtics.
3. In the teſtament.
4. In the appointments.
5. In the procurations, for the adminiſtration of the effects reſerved.

It is true, that it is ſaid in the procurations that they ſhould be revoked at the pleaſure of the *Abbé d'Orleans*; but that is of common right as in the ſame manner is the obligation to render an account: and it muſt be always remembered as the reſult of thoſe acts, which paſſed from the 23d to the 26th of *February*; that in three days time, a perſon of full age poſſeſſing effects, to the value of three millions of livres, no longer retains any property, that there is no longer any thing conſiderable of which he can diſpoſe; and that he ſtrips himſelf even of the adminiſtration of the uſufruct reſerved to him.

It is contended that there is nothing extraordinary in this circumſtance; that we ſee ſimilar examples every day in inferior families, and that it is not ſurpriſing, that the elder branches, in taking upon themſelves an eccleſiaſtical condition, renounce their property in favour of the younger.

But, in the firſt place, without examining whether there are ſo many examples of this generoſity as they would perſuade you, will they find any example of the particular circumſtances occurring in this cauſe?

The heir of an illuſtrious family renounces not the poſſeſſion of ſome conſiderable eſtates, as a principality or a duchy, but all his effects, reſerving only a ſum of ſixty thouſand livres, and a mere uſufruct. He, as it were, pronounces an interdiction upon himſelf, and if he can diſpoſe of any thing, it is only of what is to accrue after his death. This is not all. At what time does he make ſo conſiderable a donation? Is it at an advanced ſtate of life? He is hardly of age, when he haſtens to ſtrip himſelf of every thing.

By what is this immenſe donation followed?

By a teſtament in favour of the donatary himſelf. And wherefore is this teſtament made? It is not in favour of the teſtator, and for his conſolation, as the laws expreſs it, ſince he had already made one, more conformable to the inclinations which he would naturally have, in which the *Comte de St. Pol* was inſtituted. It is entirely in favour and for the intereſt of the ſole univerſal legatee, who has no other advantage in this change, than a diſcharge

charge from the ſubſtitutions, and a hope of ſucceſſions, which might afterwards fall to the *Abbé d'Orleans*.

After having ſtated the two principal views which naturally preſent themſelves to all who examine theſe acts in general, let us enter into the detail, and combine all the circumſtances which have been offered to your attention by the one party or the other.

1. The tranſaction with *Madame de Longueville* (*a*).

Obſerve, if you pleaſe, upon this act, that it is impoſſible to preſume that the *Abbé d'Orleans* could even have read the long diſpoſitions which it contains. He arrived at Paris on the 15th of *January* in the evening—he ſigned this act the following morning.

Let it not be ſaid that this act was completely prepared before the departure of the *Abbé d'Orleans*, and that there was even a conſultation of relations by which he was authorized to paſs it. The ſtate of things was much changed after that; it was then propoſed that the eſtates ſhould be valued by proper ſurveyors: in the ſequel, the valuation was made by the parties themſelves; thus, it was not the ſame act which before had been reſolved upon. It was an act entirely new, which demanded a long meditation, and at laſt they were reduced to ſay, that it was not ſurpriſing that the *Abbé d'Orleans* had ſigned the act on the faith of his counſel, as it is nothing more than is done by the moſt ſenſible people every day. But if that is ſo, the act can no longer be ſaid to be of any conſequence, ſince it does not inconteſtibly prove the ſanity of the perſon ſigning it.

It is not neceſſary, for the admiſſion of the proof demanded, to demonſtrate that all theſe acts prove the inſanity of the *Abbé d'Orleans*; it is ſufficient to ſhew, that they are not certain indications of the ſanity and freedom of his mind.

2. The grants of annuities, which follow this act, have not more force or authority than the act itſelf, of which they are only the conſequence and execution.

3. The ſale of the eſtate of *Neſle*, made by the *Abbé d'Orleans* to the *Prince de Condé*, has nothing more perſonal than the acts preceding, nothing which cannot be ſupplied by the miniſtry of another. You muſt remember the important circumſtance, from which it may be preſumed, that the *Abbé d'Orleans* contributed nothing but his ſignature. The project of the act was completely prepared before the arrival of the *Abbé d'Orleans*. The procuration of the *Prince de Condé* to ſign it, is of the 5th of *January*, and is at the foot of the project, in which no change was afterwards made, and

(*a*) Tranſaction in the civil law means a compromiſe.

although

although the ſignature was deferred until the 31ſt of *January*, the fact will always remain, that it was completely prepared, independent of the will of the *Abbé d'Orleans*.

4. The donation to the *Comte de St. Pol* combines the two principal features of all theſe acts, that is to ſay, the deſign of giving a complete diſcharge to *Madame de Longueville*, and that of entirely ſtripping the *Abbé d'Orleans* of his property.

They adduce ſeveral arguments to efface the colours which cover this donation, but as theſe equally regard the other acts, we ſhall defer anſwering them until we have gone through the particular circumſtances of the acts which follow.

5. The life-annuities require nothing more than a mere ſignature.

6. The ſame obſervation applies to the appointments to the governments.

7. We have already examined the teſtament, but we cannot forbear adding here, that the projects which accompany it only render it more ſuſpicious.

Of theſe projects, one is in the hand-writing of the *Abbé d'Orleans*, the other in that of *Porquier*: they both contain a memorandum of legacies to different perſons. There are three words added to the laſt in the hand-writing of the *Abbé d'Orleans*, by which he gives to *Dalmont* his carriage with the appurtenances.

None of theſe legacies, except that to *Porquier*, agree in amount with thoſe written in the teſtament. It is even difficult to conceive why theſe projects of codicils are incloſed in the ſame paper with the teſtament.

It is ſaid to be becauſe they might ſerve to ratify it, but why were they not followed in making it? for it is almoſt impoſſible that they could be ſubſequent to the teſtament.

But to diſmiſs all kinds of uſeleſs inquiry reſpecting a fact of this kind, let it be ſuppoſed, that theſe projects without date were prior to the teſtament, or ſubſequent to it. Suppoſing them to be prior, the intention of the *Abbé d'Orleans* was only to make a codicil confirmatory of the teſtament of 1668; for you will recollect, that one of theſe projects is intitled, *project of a codicil*, which the *Abbé d'Orleans* wiſhes to make in confirmation of his teſtament. Now, if the ſecond was not yet made, theſe words can only be applied to the firſt; and if that is ſo, the project would indicate an intention contrary to the laſt teſtament, which is ſo far from confirming the act, that it deſtroys, and almoſt entirely annihilates it.

Let it be aſſumed that theſe projects were ſubſequent to the laſt teſtament—it muſt then be ſuppoſed that they were made within

two or three days after. The teſtament is made on the 26th of *February*; it was depoſited in the hands of *Porquier*, with the projects which accompany it, before the departure of the *Abbé d'Orleans*. Now it is agreed on all hands that that took place ſeven days after the teſtament; then it is in this interval that he muſt have made theſe codicils or projects of codicils; and what greater proof can be deſired, either of the uncertainty of his will, or of his being ignorant of the latter teſtament, which he had only ſigned a few days before?

What explanation can be given of this circumſtance? But let us go on with the circumſtances which relate to the other acts.

8. The procurations given, whether to *Madame de Longueville* or to *Porquier*, are ſo far from being inexplicable, without ſuppoſing a ſtate of ſanity, that they ſeem ſtill more to confirm the ſuſpicions of the contrary, ſince thereby the family place themſelves beyond the reach of apprehenſion that he might abuſe the adminiſtration of the revenues which were left to him.

Finally, the reimburſement of the *Marquis de Bouveron*,—an act which required nothing more than his ſignature.

Such are the general and particular reflections which may be made upon the circumſtances of theſe acts conſidered in themſelves.

Let us ſee, however, what force they can have in the excluſion of parol teſtimony.

In the firſt place, they are not thoſe actions which are ſo entirely perſonal to the party doing them, that they cannot be ſupplied by another. It was only requiſite that the *Abbé d'Orleans* ſhould retain ſufficient liberty or docility to ſign them; nothing more was requiſite for rendering them complete.

Secondly, all theſe acts, except the donation and teſtament, are only common contracts, for which the law does not require the ſame degree of will or the ſame capacity as for teſtaments.

Thirdly, theſe contracts were paſſed by a man, who, if not in a ſtate of actual imbecility, was at leaſt very near to that condition of fury and inſanity, in which he paſſed the remainder of his days, an inſanity once more, of which the commencement is uncertain, and which may go back to the very time of theſe acts. Is a period of ſeven or eight months, or even a year, too long a time for examining the quality of derangement in a perſon of the rank of the *Abbé d'Orleans*, in the hopes of a cure? And if it is agreed, that they ought to defer his confinement for at leaſt that interval, then the greateſt part of the acts will fall within this time, and the weakneſs of the preſumption will be evident.

In one word, if the inſanity is once proved, nothing can be more

more eaſy than to ſhew how theſe acts might have been paſſed. Theſe two facts have nothing incompatible—is it impoſſible for a man to have ſigned ſuch acts, and to have been at the ſame time in a ſtate of imbecility? On the contrary, the ſignature of theſe acts may be ſuppoſed, without excluding the fact of inſanity, and conſequently this is not an invincible preſumption.

Finally, do theſe contracts exclude all kind of doubt? Is the interpretation of the *Prince de Conty*, in ſuppoſing that the family had it in view to take advantage of the remnant of docility, in order to terminate a part of the affairs of the houſe of *Longueville*, and to place him afterwards in a ſtate of real and ſubſtantial interdiction; is this interpretation, once more, not equally probable, when compared with the character of the *Abbé d'Orleans*, as the ſuppoſition of that imaginary generoſity to which *Madame de Nemours* would aſcribe the donation and the acts accompanying it?

Suppoſe for a moment that the family of the *Abbé d'Orleans* wiſhed to delay having recourſe to the mournful remedy of interdiction: there is nothing unlikely in this ſuppoſition with reſpect to any kind of family, but we may ſay, that the ſplendour of the illuſtrious houſe in which we ſuppoſe that this deſign may have exiſted, gives it that high degree of probability which almoſt bears the character of certainty.

Let us ſuppoſe ſtill farther that in this deſign they wiſh nevertheleſs to take precautions againſt the perſon whom they conſider to be in a ſtate of imbecility, that they wiſh to tie his hands ſo as to put him out of a condition of hurting himſelf or others. What would they do in this ſuppoſition, which is only a conſequence of the former? Would they not begin at firſt by making him loſe the property of his effects by an authentic donation? But becauſe it would not be juſt to reduce him to ſimple maintenance (which could only be done by a ſolemn interdiction), would they not reſerve a conſiderable uſufruct proportioned to the dignity of his birth?

Would they not afterwards induce him to make a teſtament, giving recompences to his domeſtics in order to attach them to his ſervice at a time when he would be no longer in a condition to give them any marks of his affection?

Would it not be a ſequel of the ſame family counſel to make him ſign procurations which might give them the management of the uſufruct that was left?

And finally, might they not give him a kind of inſpector and domeſtic curator, without whom he could not even audit the expence of his houſe? Such are all the precautions which prudence might inſpire in ſuch a caſe, as we ſuppoſe, in order to maintain,

at the ſame time, the honour and the intereſts of the family of the *Abbé d'Orleans*.

What they would have done in ſuch a caſe, if it had occurred to them, we find has actually been done in the caſe before us. Then we may reaſonably conclude, that the family had ſuch thoughts; and can we even doubt of it, when we ſee that the plan of theſe acts was ſo completely framed with a view to a ſtate of inſanity, that when that ſtate became completely notorious, it was not neceſſary to make any alteration? It ſubſiſts in every part, and the family, upon being convened, are of opinion, that *Madame de Longueville* and *Porquier* ſhould continue to act by virtue of the procurations of the *Abbé d'Orleans*, although they could have no difficulty in knowing that thoſe procurations were void, at leaſt at the time of the conſultation, on account of the imbecility of the perſon who had given them.

Why ſhould they not chuſe to do that tacitly at a time when ſome hopes were entertained of being able to conceal the ſituation of the *Abbé d'Orleans*, which they did expreſsly when they could no longer prevent his inſanity being notorious?

What is ſaid in anſwer to theſe natural preſumptions? It is ſaid, in the firſt place, that if the family had had the deſign which is imputed to them, it would have been uſeleſs to have gone through ſo many acts with the *Abbé d'Orleans*. They might have begun with the donation, and have afterwards treated more ſecurely with the *Comte de St. Pol.*

But they do not take notice, that this ſucceſſion of acts was neceſſary for the accompliſhment of the object which they appear to have had in view at that time.

The *Comte de St. Pol* was a minor; he could not give a valid diſcharge to his mother, nor contract any ſolid and irrevocable engagement with her. Even ſuppoſing him to have been a major, he could not have diſcharged her from the obligation of rendering an account. It was neceſſary that the donation ſhould contain an aſſurance of all theſe acts and diſcharges by impoſing upon the donatory, the eſſential and inviolable condition of confirming all theſe acts, and approving all theſe diſcharges.

But, beſides, may it not be ſaid, that if we once ſuppoſe the ſingle fact, the probability of which is indiſputable, that the family wiſhed to conceal, as long as they could, the weakneſs of the *Abbé d'Orleans*, it will not be difficult to conceive why he ſhould ſign all theſe acts?

The new acts were either uſeful or neceſſary, and advantageous to his family, and it was requiſite that he ſhould ſign them before he was ſolemnly interdicted.

5 But

But what conſequence can be deduced from this with regard to an act purely voluntary, and which the law does not permit, except for the conſolation of the teſtator, and not for the intereſt of his family?—The whole, then, comes to this, whether we may ſuppoſe this ſingle fact, that the family deferred for ſeven or eight months to publiſh the misfortune that had happened to the *Abbé d'Orleans?*

Once more, this ſingle ſuppoſition may be the general developement of all the difficulties that are preſented to us.

But if all theſe acts, or rather all the preſumptions ariſing from theſe acts may be deſtroyed by a fact ſo eaſy to ſuppoſe, and alſo ſo eaſy to prove, who can believe that ſuch preſumptions are ſufficiently ſtrong to authoriſe the rejection of parol teſtimony?

It is ſaid, in the ſecond place, that if the *Abbé d'Orleans* was really in a ſtate of imbecility, it would be ſuperfluous to leave him an annual revenue of 6000 livres. It is ſtill leſs eaſy to reconcile ſuch a ſuppoſition, with a reſervation of a groſs ſum of 60,000 livres, of a moiety of the *Hotel de Longueville*, of a great quantity of furniture, and, finally, of the power to diſpoſe by teſtament of the two years' revenue ariſing after his deceaſe.

But, in the firſt place, as to what regards the *Hotel de Longueville*, and the furniture there, can it appear ſtrange that they ſhould reſerve to the eldeſt member of the houſe *de Longueville* the habitation which belonged to him in the reſidence of his father?

And as to the power of diſpoſing of certain portions of his effects, it might be reſerved, as we have already ſaid, for the purpoſe of aſſuring the recompence which might be wiſhed to be given to his domeſtics.

They add, that it is inconceivable that any other than the donor himſelf ſhould have ſtipulated for the right of return, in favour of *Madame de Nemours*.

But it is ſufficient to prevent this preſumption from being inſuperable, if we ſhew that it may admit of explanation, and this has been done on the part of the *Prince de Conty*, by obſerving, that they may have taken this precaution for the purpoſe of preventing of *Madame de Nemours* coming forward at any time to impeach the authority of theſe acts.

Finally, as a laſt and general argument applicable to all the acts, you have been told of the improbability that ſuch perſons as *Madame de Longueville* and the *Prince de Condé* would have choſen to treat with a perſon in a ſtate of imbecility; and that it is ſtill more abſurd and unjuſt to ſuppoſe that they would have taken an improper advantage of ſuch imbecility; that, in fine, the public have an intereſt in preventing parol teſtimony being admitted in

oppoſition to ſuch weighty proofs, as if that ſhould be once allowed, no teſtament could ever be ſecure.

It is ſufficient to reſume the diſtinction, which we have propoſed between the contracts and the teſtaments, in order to anſwer all theſe objections.

1. All theſe contracts may be good, either becauſe nobody impeaches them or can impeach them, or becauſe they are for the moſt part advantageous to the *Abbé d'Orleans*, and the benefit which his family might receive from them might be ſufficient to render them obligatory upon him until the time of his being actually placed in a ſtate of interdiction.

2. It is not neceſſary to accuſe the memory of a princeſs whoſe virtue was known, and revered by all France, in order to maintain the argument that all theſe acts may have been done with her participation, and that ſtill the *Abbé d'Orleans* was not in a ſituation to make a teſtament.

Shall it be ſaid that a father, that a tutor, that a huſband, render themſelves guilty of a criminal ſuggeſtion when the perſons who are ſubject to their authority ſign, under the faith of their underſtanding and diſcretion, acts of which themſelves are not acquainted with the force or conſequence?

It is true, that as a general ſuppoſition, acts of the quality of thoſe which are now adduced, are powerful preſumptions in favour of the ſanity of a teſtator; but we are here very far from the caſe of this general ſuppoſition. We are not inquiring into the teſtament of a man who died in the poſſeſſion of his ſtate—this is the firſt point of difference.

The acts which are adduced were upon the eve of a notorious and indiſputable inſanity, which is a ſecond difference.

Finally, all theſe acts may be explained ſo as to form a preſumption which, if not neceſſary, at leaſt is probable, of the weakneſs of the teſtator.

If the public has an intereſt that parol teſtimony ſhall not, upon ſlight grounds, be admitted, the ſame intereſt requires that it ſhall not on ſlight grounds be rejected. The effects and conſequences are in either caſe nearly equal.

But, after all, was ſuch a queſtion never preſented before? Is it ſuch a new thing to admit a proof by witneſſes, notwithſtanding the authority of contracts?

You have, Sirs, two illuſtrious inſtances of it.

There is no caſe more ſtrong than the ſentence which you gave in the cauſe of *Pajet*, in which the evidence of inſanity was carried back to a period many years before the interdiction, and that not for the purpoſe of deſtroying a teſtament, but to impeach the validity

lidity of contracts, although the creditors could allege in their favour both their good faith and their ignorance.

If much proof has been received, where the queſtion has related to the deſtruction of contracts themſelves, can it be refuſed in ſuch a caſe as this?

Let us paſs, however, to the ſecond preſumption deduced from the conduct of the *Abbé d'Orleans*.

1. We muſt cut off that part which is deduced from *Madame de Longueville* permitting him to celebrate the maſs. There is no proof of this fact; it only appears that he was furniſhed with a chalice for this ſervice; but what can be concluded from that, except that the maſs was ſaid before him?

2. He has, indeed, audited accounts, but all theſe accounts were reviſed, from the 1ſt of *March* to the 15th of *July*, in the preſence of *Dalmont*, as is proved by the diſcharge of *Pernis*. Then it is more than probable, that *Dalmont* was ſet over him as an inſpector; no other reaſonable explanation can be given of it; and if ſuch is the fact, it is a proof that, from the 1ſt of *March*, two days after the teſtament, he was not deemed capable of auditing an account.

3. He ſigned bills of exchange and orders, but amongſt thoſe bills of exchange, there is one of a very extraordinary form.

4. He wrote ſeveral letters, but only to *Porquier*. It is admitted that theſe letters are full of repetitions of a niggardly attention, of an unbecoming avarice; but they are not abſolutely deſtitute of ſenſe. It would be neceſſary to enter into a very long detail, if we were to examine whether all the facts, which are mentioned in thoſe letters, indicate a perfect knowledge of the ſtate of his affairs; but this much is certain, that the argument of the letters is very equivocal, ſince he wrote one in the month of *November*, after he was in a ſtate of confinement, which is at leaſt as ſenſible as any of the others.

Beſides, one of the letters, adduced by *Madame de Nemours*, falls within the period of the inſanity, if we are to give credit to *Madame de Longueville*.

Finally, as to the third preſumption, the judgment of the family—the donation which was always ſuppoſed to be valid, the orders, the bills of exchange, have always had the approbation of the family.

But, 1ſt, as to the orders; if the fact reſpecting *Dalmont* is true, it is not very aſtoniſhing that they were approved, as it would be very well known in what manner they were paſſed.

2. Nobody attacked the donation, nor could attack it with effect.

How can all theſe approbations operate to the prejudice of a third perſon.

Upon the form of the ſentence of the court below, it is ſufficient to obſerve,

1. That the ordonnance requires the allegation of a preciſe fact, but not of the proofs of that fact. Here the fact is the inſanity—the proofs of it are the circumſtances to which each witneſs may depoſe. It is always neceſſary to diſtinguiſh between a fact which is ſingle and particular, and a general fact which extends over ſeveral others.

2. It is in this manner that your judgments have interpreted the ordonnance.

The caſe of *Pajet*, 1681; the caſe of *Boſſu*, 1675, &c. &c.

The inſanity is evident; the only object is to prove the commencement of it.

4. The argument of *Madame de Nemours* proves too much: if it was neceſſary to allege theſe circumſtances, in order that ſhe might have an opportunity of proving the contrary; it would follow that nothing could be proved but what was particularly alleged. Now this conſequence would be abſurd; then nothing can be concluded from this reaſoning.

Let us, finally, add two general reaſons:

Firſt, the doubt upon the facts is a motive for permitting the party to make proof of them.

Secondly, the inconvenience of refuſing it is manifeſt, and, on the contrary, there is no inconvenience in admitting it.

SECOND PLEADING.

In the Caſe of the Prince de Conty and the Ducheſs de Nemours,

Pronounced in ſeveral Audiences, the laſt on the 14th of March 1698.

Upon the appeal of *Madame de Nemours*, from the definitive ſentence of the *Requêtes du Palais*, in favour of the *Prince de Conty*.

I. *Whether the queſtions decided in* 1696 *could be revived; and ſuppoſing the matter to be entire, whether the ſame deciſion ought not to prevail?*

II. *Whether the great number of acts, ſigned by the* Abbé d'Orleans, *about the time of his making a ſecond teſtament, were a proof of his ſanity, or of the intention of his relations to place him in a ſtate of interdiction, having knowledge of his inſanity?*

III. *Whether his inſanity at that time was ſufficiently proved by witneſſes?*

FIRST AUDIENCE.

WHATEVER conſequence the name of the parties, the number of the queſtions, the vaſt extent of the facts, may have given to this cauſe, we think it may be affirmed, that nothing renders it more ſingular and important than the nature and quality of the principal queſtion, which is this day ſubmitted to your judgment.

You have to pronounce, not upon one of thoſe queſtions of ſtate, which relate to the birth or condition of parties, (exterior qualities written in public regiſters, preſerved in authentic monuments, and of which the principal proof is derived from the authority of the law itſelf,) but upon one of thoſe doubtful and difficult queſtions, of which the only ſubject is an inviſible quality, that frequently conceals itſelf from the moſt enlightened wit-

witneſſes, an interior diſpoſition, of which acts and writings are only an obſcure and imperfect image; in a word, when you are to decide upon the ſtate of the mind, much more than upon that of the body.

If this queſtion appears difficult, when conſidered in general, what will it be when we examine it, in the caſe before us, when the perſon whoſe ſtate is the principal ſubject of conteſt, can neither juſtify his accuſed reaſon, nor furniſh us himſelf with the proofs of his inſanity.

The perſon is wanting, while we are examining the quality, which of all others is moſt peculiarly perſonal.

It is not a queſtion of preſent ſanity or inſanity, that is the ſubject of this cauſe; it is a ſanity or inſanity which is paſt, and you have not only to decide upon an inviſible quality, but alſo on a quality which no longer exiſts.

And in what manner to decide? In a conflict of acts (*a*), contrary to each other, in a combat of witneſſes, mutually attacking and deſtroying each other. Nor is this all, not only are acts balanced by acts, not only are witneſſes combated by witneſſes, but this combat takes place in every act, this contrariety occurs in every witneſs, contraſted with himſelf; ſuch is the uncertainty of the proofs, or the ability of the pleaders, that there is in this cauſe, no act, no witneſs, that does not furniſh alternately, arms to each of the parties. You have frequently ſeen, in the courſe of a long pleading, the ſame voice which ſeemed one day to declare in favour of ſanity, regarded on the next as an equally ſtrong atteſtation of madneſs, and in the midſt of this equality of advantages, where each party ſeems to have proved the fact that he has advanced; truth becomes obſcured, darkneſs is increaſed inſtead of being diſſipated, and every thing which remains to the ſpectators of ſo obſtinate a combat, is doubt, obſcurity, and uncertainty.

Finally, as if it was little to decide ſo difficult and extended a queſtion of fact, there are added to it the moſt ſubtle queſtions of law; and after having oppoſed acts to acts, witneſſes to witneſſes, they introduce a ſimilar combat of laws and expoſitors, and the law becomes not leſs doubtful than the fact.

Such, Sirs, is the important ſubject of your deliberation, calculated to perplex us by its difficulty, to overwhelm us by its grandeur, and even to deter us by its immenſity, if we only conſulted our own forces, and were not ſupported by the great and painful attention that the court has given to this long affair; if we did not know, that it was equally informed with ourſelves as to all the

(*a*) The word *Acts* in this place, as in general throughout theſe pleadings, means written inſtruments.

detail

detail of facts; if we were not perſuaded that our miniſtry was reduced, to combining and recording the different facts, and to bringing before your eyes, as with one ſtroke of the pencil, the lively and preciſe images of the principal circumſtances, which are to form the matter for your judgment.

To do this with the order that the vaſtneſs of the ſubject demands, we ſhall begin by diſtinguiſhing three periods or epochas in the life of the *Abbé d'Orleans.*

In the firſt, a ſtate of ſanity is certain and admitted.

In the ſecond period it becomes doubtful; one of the parties attacks and combats it, the other ſuſtains it, and this period comprehends every thing which paſſed from the month of *July*, 1670, to the month of *October*, in the year following; at which time the madneſs of the *Abbé d'Orleans* obliged his family to have him put into confinement.

Laſtly, in the third period, we have the ſame certainty as in the firſt, but in the one, it is a ſtate of ſanity, in the other a ſtate of inſanity acknowledged by both the parties; thus the extremes of the three periods, which we diſtinguiſh at the outſet of this cauſe, are equally luminous; the middle alone is obſcure and overwhelmed with darkneſs. It is this obſcurity and darkneſs which we muſt this day entirely diſſipate, in order to add this doubtful and equivocal period, either to the certain period of ſanity or to the certain period of inſanity.

Theſe three periods are conſiderable, not only in reſpect to the ſtate of the *Abbé d'Orleans*, but alſo in reſpect of the acts which form one of the moſt important parts of this cauſe.

In the firſt period, we find the firſt teſtament, that is to ſay, the title, the foundation of the demands of the *Prince de Conty*, and the ſubject of all the queſtions of law, which have ariſen in the cauſe.

In the ſecond, we diſcover the ſecond teſtament, the donation, and all the acts which accompany it; that is to ſay, one of the principal proofs, either of the ſtrength or weakneſs of the *Abbé's* underſtanding.

Finally, in the laſt period, we obſerve an infinity of acts, which on the one ſide are contended to be a confirmation, of thoſe which were done in the ſecond period; and invincible obſtacles to all who ſhall offer in the ſequel to attack thoſe ſame acts.

But without dwelling longer upon the advantages of this diſtinction, which will be ſufficiently obvious in the whole progreſs of the cauſe, let us proceed to the explication of the facts, and begin with thoſe which relate to the firſt period, that is to ſay, every thing

thing which paſſed from the birth of the *Abbé d'Orleans*, to the month of *July*, 1670, when his ſanity firſt becomes the object of ſuſpicion.

If we were ſpeaking to judges who are leſs informed, we might begin with mentioning the ſtate of the family of the *Abbé d'Orleans*, the two marriages of the *Duke de Longueville*, his father, both of them equally illuſtrious by the honour which he had of renewing the ancient alliances of his houſe, with the auguſt blood of our kings; we ſhould obſerve, that *Madame de Nemours* owes her birth to the firſt of theſe marriages, that the ſecond was followed by that of two children, *John Louis Charles d'Orleans*, born in 1646, whoſe ſtate is now the object of your judgment; and *Charles Paris d'Orleans, Comte de St. Pol*, born in 1648; we ſhould afterwards trace the portrait and characters of theſe two brothers, characters ſo different, that the one ſeemed born to obey, the other to command; the one condemned by nature to obſcurity and retirement; the other deſtined by the elevation of his genius, even more than by his birth, to fill the moſt eminent ſituations.

But all theſe facts are perfectly known to you; we have already ſtated them at the time of the interlocutory ſentence, and we are loaded with ſuch a multitude of neceſſary circumſtances, that we ought at once to retrench all thoſe which ſerve rather for ornament than deciſion.

We ſhall content ourſelves then with mentioning, that the *Abbé d'Orleans* conceived from his infancy the deſire of entirely devoting himſelf to eccleſiaſtical functions. After an education ſuitable to the dignity of his birth, his firſt ſtep, at an age when he ought to have ſhone forth to the world, was to enter upon his noviciate with the *Jeſuits*, in order entirely to renounce all ſecular engagements; whether his health did not permit him to ſupport the ſimple and painful life of that condition, or whether from diſguſt or inconſtancy, it is certain that he did not continue in it long, but he left it without loſing the ſpirit of his firſt vocation, which led him to an eccleſiaſtical condition. He retained the habit, and finally received the character.

He joined to this natural inclination, a violent paſſion for taking journies, not only from a motive of curioſity, which is common to all men, but with a kind of inconſtancy and diſquietude peculiar to himſelf, and which led him frequently to change his place, without any other deſign than that of changing it.

We learn from the accounts of his expence, that he ſpent almoſt the whole of the years 1667, 1668, 1669, in going from city to city, from province to province, followed by a ſmall number

of

of attendants, returning frequently to the ſame places he had juſt quitted, living with a frugality and parſimony little proportioned to the ſplendour of his name, and frequently even aſhamed of bearing it, and affecting to take that of *Meru*, in order to have the liberty of travelling as a private individual, content with indulging, in every place, his unquiet and laborious idleneſs.

Champaigne, *Burgundy*, the *Lyonnois*, *Provence*, *Italy*, were the provinces and countries which he ran through in his long courſes, but without ſtopping to give you an exact journal, and a regular itinerary of his travels, let us confine ourſelves to the principal inſtruments which he has executed, and the acts which alone can be of conſequence in this cauſe.

Three of his journies are marked by acts which equally diſtinguiſh them.

[*The Advocate General here took a view of the donations of Neufchatel, of the firſt teſtament and of the emancipation ſimilar to that contained in the former pleading; and afterwards proceeded as follows.*]

Scarcely had this public proof, this ſolemn teſtimony, been given of his ſanity, when, according to the counſel of the *Prince de Conty*, he obliged his family to repent of it, by the ſad but infallible preſages which he gave at *Saint Maur*, of the approaching loſs of his reaſon.

It is then preciſely at this point, that the firſt period of the *Abbé d'Orleans* terminates: we have hitherto walked in the light, we have obſerved the journies of the *Abbé d'Orleans*, we have remarked the ſtriking acts which have diſtinguiſhed them. Hitherto, every thing is certain and agreed upon between the parties, but now all becomes doubtful and uncertain; we enter upon a region of darkneſs, where we can only catch a glimpſe of truth, through the thick veil with which it is covered, until you ſhall have diſſipated the clouds which ſurround it.

In the ſecond period as in the firſt, we find journies and written inſtruments, but journies and inſtruments ſo equivocal, that on the one ſide they are regarded as invincible proofs of ſanity, and on the other they are made uſe of as an evident demonſtration of the contrary.

All the facts which relate to them, are naturally divided into three claſſes, or three different parts.

Thoſe which precede the laſt teſtament of the *Abbé d'Orleans*, thoſe which accompany it, thoſe which follow it.

Thoſe which precede it are almoſt neceſſary; thoſe which accompany it are abſolutely eſſential; thoſe which follow it are uſeful;

uſeful; let us apply ourſelves to this order, and begin with the circumſtances which precede the time of the laſt teſtament.

We have told you that the counſel of the *Prince de Conty* inſiſts that it was at *St. Maur*, that they obſerved the ſanity of the *Abbé d'Orleans* gradually diminiſh and his imbecility increaſe, by a progreſs equally ſenſible and lamentable. We ſhall lay before you, in the ſequel of this cauſe, the proofs by which they contend they have eſtabliſhed this fact, and thoſe by which *Madame de Nemours* oppoſes it. Let us at preſent only follow the ſteps of the *Abbé d'Orleans*, as they are known by ſolemn acts, and other written evidence.

After having paſſed about three months at *St. Maur*, he comes to *Paris*. He ſtays there till the end of *Auguſt*; he ſets out on the 30th of *Auguſt*, to take the journey of the river *Loire*, a journey which is of great importance in this diſpute, a journey of which the ſubject, the motive and the end have become one of the queſtions of the cauſe, a journey, in ſhort, which has produced that multitude of witneſſes, who have occaſioned, in every city, the ſame diviſion, the ſame oppoſition, the ſame combat between the ſanity and inſanity of the *Abbé d'Orleans*, which has taken place to-day, in the tribunal of juſtice.

Whilſt the *Abbé d'Orleans* is engaged upon this journey, his relations deliberate upon one of the moſt important affairs of his family, upon the payment of the large ſums which were due to *Madame de Longueville*; they permit the *Abbé d'Orleans*, and the *Comte de St. Pol*, to give up a certain eſtate to her, according to a valuation to be afterwards made. The opinion of the relations is confirmed by a ſentence of the 2d of *September*, 1670; but this plan was not executed until after the majority of the *Abbé d'Orleans*, and his return to *Paris*; thus, there is nothing to prevent us following him in his route, and running over the principal provinces, which were the witneſſes either of the ſtrength or the weakneſs of his mind.

He ſet out in a hired carriage, accompanied by an *almoner*, a *gentleman*, two *valets de chambre*; he arrived at *Orleans*, he takes up his abode at a petty inn there, called the *Plough*; he continues there nine days, he purſues his journies, goes to *Blois*, ſtays twelve days at *Tours*, the ſame time at *Samur*, makes a deviation to ſee the *Chateau de Richlieu*, reſumes again the courſe of the river *Loire*, ſtays ſome time at *Angers*, deſcends as far as *Nantes*, where he makes a ſtay of three weeks, leaves it on the 12th of *November*, returns to *Angers*, and the rigour of the ſeaſon obliging him to finiſh his journies, he takes the reſolution of returning into the

boſom of his family. He comes by the common ſtage, and arrives at *Gué de Loré*, one day's journey from *Paris*, he there finds a valet of the *Comte de St. Pol*, and all at once he changes his deſign; either voluntarily or by conſtraint, he abandons his firſt project, he reſumes the route of *Orleans*, he hires three horſes at one place, and three chairs at another, and followed by two of his domeſtics, whilſt the others continue their courſe to *Paris*; he returns upon his ſteps, and by a croſs road arrives the ſame evening at *Orleans*.

Such, Sirs, is the grand fact of *Gué de Loré*, of which all the circumſtances have been obſerved upon with ſo much art, in the oppoſite pleadings of this cauſe—is it neceſſary that we ſhould here retrace the colours which have been given on the one part, and on the other, to this important fact? they were too lively to be ſo ſoon effaced; on the one ſide you are told that there was nothing extraordinary in this change of route and deſign; the former journies of the *Abbé d'Orleans* furniſh a thouſand ſimilar inſtances of inconſtancy. We ſee him frequently returning to the ſame places, leave a city as if he was never to be there again, return a ſhort time afterwards, and what is there in this, which is not common to all who travel for the mere pleaſure of travelling? On the other ſide you have been often told, ſometimes that this ſudden change was a real proof of the inſanity of the *Abbé d'Orleans*, incapable of adhering regularly to one deſign: led away by caprice, by levity, by ſudden impreſſions, he follows at random the ſallies of a deranged imagination. He begins a journey and does not complete it. He ſets out to ſleep at *Paris*, and he goes to ſleep at *Orleans*, and the diſorder of his journey is a faithful portrait of the derangement of his mind. At other times they have attributed this event to the ſuperior orders of the family of the *Abbé d'Orleans*, who would not as yet permit him to appear at *Paris*. They repreſent him as one of thoſe feeble and timid minds, which having thrown off the yoke of reaſon, reſpect no other yoke than that of force and fear, and being no longer able to govern themſelves, neceſſarily become the ſlaves of others.

We do not as yet examine which of thoſe colours is more conformable to truth, we merely refer to them, that you may ſee the importance of the fact, and after this ſlight digreſſion, we reſume with the *Abbé d'Orleans*, the route of the cities on the river *Loire*, which he went to ſee a ſecond time.

The ſtay at *Orleans* was longer this ſecond time, than the firſt. He paſſed 39 or 40 days there, and at the end of that ſtay, he calls his *almoner* to write this important letter: this new piece of evidence which,

which, *Madame de Nemours* inſiſts, is in itſelf ſufficient to decide this cauſe in her favor.

The *Sieur Metayer*, almoner of the *Abbé d'Orleans*, who had followed him in this laſt journey, and had quitted him at *Gué de Loré* to return to *Paris*, came to him again at *Orleans*, in the beginning of *December*, is the perſon who is charged with writing this letter.

He writes to the *Sieur de Sainte Beuve*, doctor of the *Sorbonne*, and informs him that the *Abbé d'Orleans*, at the eve of his departure for *Tours* being detained by ſome buſineſs, could not write to him himſelf, but had charged him to do ſo, requeſting him to have the ſame attachment to his ſervice which he had hitherto ſhown, and to attend to a project concerning a treaty which the *Abbé* was making with the *Comte de St. Pol*, his brother; that *Perquier* would lay the treaty before him and they ſhould ſettle it together; he adds, that in order to ſhew the *Sieur de St. Beuve*, how agreeable his paſt ſervices were to the *Abbé d'Orleans*, and how much he deſired the continuation of them, he had granted him a penſion of 1000 livres, the brevet of which would be given him by *Dalmont*.

Not ſatisfied with having ordered his almoner to write this letter, the *Abbé d'Orleans* adds three lines with his own hand, approving the contents; obſerve the terms in which his approbation is conceived.

Every thing which M. Metayer has told you of my intentions is true. Adieu, without adieu. Be diligent that I may ſay to you with joy in viam pacis. *Every thing good attend you. Your ſervant*, J. L. C. d'Orleans, *Prieſt*. (*n*)

This letter is dated the 28th *September* 1670, it is accompanied by a brevet, for the penſion written and ſigned by the *Abbé d'Orleans*, and they were both taken by *Dalmont*, who ſet out the day following, the 29th of *December*.

The ſame day the *Abbé d'Orleans* embarked on the river *Loire*, to return to *Tours*. He ſtaid there ſix days, and finally on the 10th of *January*, two days before his majority, he ſet out from *Tours*, in a public conveyance, and arrived on the 15th in the evening at *Paris*.

His arrival is the laſt of the facts, which precede the time of the teſtament, and the firſt of thoſe which regard the time of the teſtament itſelf. But before we enter upon the explication of theſe facts, we muſt add to the circumſtances which preceded the time of the teſtament, the important fact of ſome orders, ſigned by the *Abbé*

(*n*) Tout ce que M. Métayer vous mande de mes intentions, eſt vrai. Adieu, ſans adieu; diligentez tout, afin qu'avec joie je puiſſe dire: *in viam pacis*. Tout a vous, votre ſerviteur, *J. L. Ch. d'Orleans*, Prêtre.

Abbé d'Orleans, for the expence of his family, and of ſome bills allowed either by him or *Madame de Longueville*, for articles uſed in the celebration of the maſs, with which he was furniſhed in the month of *July* 1670.

You have heard the inference which is drawn from theſe facts, they are ſaid to amount to a written proof of the *Abbé d'Orleans* having celebrated maſs, at the very time when the *Prince de Conty* alleges, that he was in a ſtate of complete and abſolute madneſs.

Let us now proceed to the explication of circumſtances of fact, which relate to the time of the teſtament.

We include in this term, every thing which paſſed from the 15th of *January* 1671, the day of the *Abbé*'s arrival, to the 5th of *March* following, the day of his departure from *Paris*.

It is in this interval of time, that the principal acts are compriſed, which were at firſt made uſe of, to induce you to reject a proof of inſanity, and which are now relied upon, as eſtabliſhing a proof of the ſanity of the *Abbé d'Orleans*.

We ſee at firſt a great number of acts which relate to the domeſtic adminiſtration of his affairs, ſigned orders, allowances of bills and accounts, and amongſt theſe bills, there are ſome which mention a chalice and books, purchaſed for the uſe of the *Abbé d'Orleans*.

But we afterwards obſerve thoſe more important acts, which have been mentioned to you ſo often, both by the one party and the other; of which you are ſo well informed, and which it will be ſufficient ſlightly to run over, rather to recal, than to preſent an idea of them.

[*Here follows a view of the ſeveral written inſtruments, and the facts mentioned in the former pleading, down to the time of the interdiction.*]

Soon afterwards Heaven ſtruck the houſe of *Longueville* with a blow more ſenſible than the former.

The only hope of this illuſtrious houſe, the laſt offſpring of this race ſo fertile of heroes, died with his arms in his hand, and *France* regarded his death as a public calamity.

This unexpected accident obliged the family to aſſemble a ſecond time, to regulate the effects which had reverted to the *Abbé d'Orleans*, by virtue of the clauſe in the donation to the *Comte de St. Pol*.

They committed theſe, as well as the remainder of the property, to the care of *Madame de Longueville*, whom the king appointed curatrix. The donation of *February* 1671 was regarded in this aſſembly as a title that ought to be carried into execution. *Madame de Longueville* performed fealty and homage, for the property compriſed in the donation, as the *Comte de St. Pol* had done before. The

king made the ſame remiſſion of the rights of relief, which he had done the *Comte de St. Pol*; and in ſhort the donation was fully and completely carried into execution by the family, which important fact is contended to amount to an eſtoppel (*fin d' une recevoir*) to claim of the *Prince de Conty*.

Madame de Longueville died in the year 1679; the office of curator was divided after her death, between the *Prince de Condé* and *Madame de Nemours*.

They examined the ancient accompts of *Porquier*, and approved of all the orders and allowances of accompts ſigned by the *Abbé d'Orleans*.

At laſt, after twenty-three years of a life more ſad than death, the *Abbé d'Orleans* ended his days, and with him was extinguiſhed for ever the exalted name of *Longueville*.

Soon after his deceaſe the widow of *Porquier* produces the teſtament with the projects which accompany it, and which are opened at the office of the *Civil Lieutenant*. *Madame de Nemours* entered into poſſeſſion of all the property as heir by blood; the *Prince de Conty* forms a demand againſt her, by virtue of the firſt teſtament. He demands poſſeſſion of the property of which the *Abbé* had power to diſpoſe; *Madame de Nemours* alleges in oppoſition to his demand, that his title is void, and alſo that it is revoked by the laſt teſtament. They agitate ſeveral queſtions of law, which are long, important, and difficult; at length the *Prince de Conty*, to remove the obſtacle of the laſt teſtament, alleges the fact of inſanity, and demands a liberty to prove that at the time of that teſtament, and for above ſix months before, the *Abbé d'Orleans* was notoriouſly out of his ſenſes, and in a ſtate of derangement known to all who approached him. After a long inveſtigation, the *Court of the Requêtes du Palais*, the judges of this celebrated difference, ordained that the *Prince de Conty* ſhould make proofs of the facts contained in his *requêtes*, without prejudice to *Madame de Nemours* giving proofs to the contrary if ſhe thought it expedient.

The appeal from this ſentence was brought before you, the cauſe was pleaded during twenty-two audiences, and you confirmed the ſentence.

Never was ſentence more fully executed. Seventy-ſix witneſſes on one ſide, eighty-five on the other, gave oppoſite evidence upon the ſtate of the *Abbé d'Orleans*.

The cauſe was brought a ſecond time before the original court; it was then pleaded for near ſix months. *Madame de Nemours* took an exception to *M. de Machault*, who had taken the inqueſt; her exception was not allowed; ſhe appeals from the ſentence which admits *M. de Machault* to continue a judge, and pending that appeal, they proceed to deliberation, they deliberate for eleven mornings,

mornings, and finally pronounce a definitive ſentence, decreeing the firſt teſtament in favour of the *Prince de Conty* to be carried into execution; and becauſe the judgment imports that it ſhall be carried into execution, notwithſtanding the appeal, upon giving ſecurity, the *Prince de Conty* offers a ſecurity, which the court admits as ſufficient.

Madame de Nemours has alſo preſented an appeal againſt this judgment, equally attacking all the three ſentences of the *Requêtes du Palais*.

Such, Sirs, are all the circumſtances of fact and procedure, which form the ſubject of the moſt extenſive cauſe that was ever ſubmitted to your tribunal. Happy ſhould we be if we could flatter ourſelves with having given you a juſt idea of it, and alſo if we could lay before you, in a few words, all the reaſons of the one party and the other, without diminiſhing any thing of their force and weight by the brevity and ſuccinctneſs with which we ſhall be obliged to repeat them. But if we cannot approach to that perfection which we can only diſcover at a diſtance, and deſcribe with difficulty, we ſhall conſole ourſelves at leaſt with a perſuaſion that, as the penetration and exactneſs of thoſe who have ſpoken before us have left nothing to deſire on behalf of the parties, the continual application, the painful and laborious attention, which were given to them by the court, will enable you to ſupply all the defects ariſing either from the weakneſs of our talent, or the vaſt extent of the ſubject.

[*The arguments of the reſpective parties are next detailed at length.*]

It is thus by apparent colours, and by arguments bearing the characters of truth, that the one party and the other ſeem alternately to make reaſon and juſtice enter into their intereſts, and equally confirm what we have obſerved in the commencement of this cauſe—that in the midſt of ſo many oppoſite probabilities, truth becomes obſcured, and the light diſappears until your judgment ſhall recal it to revive in all its luſtre. We wiſh it were poſſible to advance the moment which the public have ſo long expected; but the vaſt extent of the ſubject obliges us to defer ſtill further the explication of our reflections upon ſo important a cauſe, and we ſhall not offer them until we have ſtated the facts which reſult from the reſpective proofs, by reading the depoſitions of the witneſſes on the one ſide and the other.

SECOND AUDIENCE.

We began the explication of this cauſe by giving you an exact account of the eſſential circumſtances of fact, and the principal arguments of the parties. We now proceed to lay before you the

proofs of the hiſtory of the life of the *Abbé d'Orleans*, which are to augment ſtill further the obſcurity and uncertainty that prevail in the whole of this conteſt, and to repreſent *M. de Longueville* in that doubtful eſtate between reaſon and madneſs, in which one ſet of witneſſes depict him as a man of unqueſtionable ſanity, and another, on the contrary, as a man in a ſtate of public and notorious ideotiſm. But that the proofs may be more manifeſt and aſſured, we ſhall divide every thing that we have propoſed to diſcuſs in this audience into two parts.

We ſhall firſt contemplate the proof with reſpect to the quality of the witneſſes, and examine the general and particular exceptions that are oppoſed to them.

We ſhall afterwards conſider it with reſpect to the nature, the force, and the weight of their depoſitions. In the firſt point, our view will be directed to the perſons. In the ſecond, we ſhall confine ourſelves to the facts, and this laſt part will be almoſt reduced to reading the depoſitions of the principal witneſſes, without blending therewith any of thoſe ingenious commentaries which are frequently more adapted to excite our admiration of the genius of the interpreter than to elucidate the text and letter of the depoſition; and we wiſh it was poſſible for us to make the acts and witneſſes always ſpeak for themſelves, without adding any thing of our own in a cauſe of this importance.

Let us enter, then, into the examination of the exceptions to the witneſſes. We do not examine at preſent the truth of what has been urged, that even ſetting aſide all the witneſſes excepted againſt by *Madame de Nemours*, there is ſtill ſufficient in the inqueſt of the *Prince de Conty* to form a complete proof. While they urge the argument they do not give up the witneſs excepted againſt; and how could they give them up, when, in all the other parts of the cauſe, they have referred to them as eſſential and deciſive of the conteſt.

We may, then, for the preſent, paſs by this firſt obſervation; and there is nothing to diſpenſe with our examining the exceptions: on the contrary, every thing obliges us to do ſo. Let us begin with thoſe which *Madame de Nemours* has propoſed againſt the witneſſes of the *Prince de Conty*.

There are two kinds of exceptions, the one general, and founded upon the rules of law, the other particular, and deduced from ſome important facts. We do not compriſe under this name of general exceptions the ſuſpicions which they have endeavoured to throw upon the reſpective inqueſts. We ſhall not ſpeak of thoſe until we come to the parallel of the two teſtimonial proofs. We only examine at preſent the general exceptions which are furniſhed by the

the law, and which are reduced to the two principal grounds of age and poverty.

And becauſe there is a vaſt career before us, and the mere reading of the depoſitions of the witneſſes will occupy a very conſiderable time, permit us, Sirs, without entering into long diſſertations, to lay before you plainly and ſimply the general principles which the ſentiments of our beſt practiſers, and the authority of your judgments have eſtabliſhed upon this ſubject.

The firſt principle is, that there is no ordonnance which fixes the number and quality of exceptions; therefore, upon theſe occaſions, they may ſucceſsfully uſe the authority of written reaſon, (*a*) as it is expounded by our doctors, and tempered by uſage and practice.

The ſecond principle, founded upon the authority of that which, after the example of the greateſt magiſtrates who have ever appeared in this aſſembly, we have juſt called written reaſon, is, that the power of giving evidence is a kind of natural liberty granted to all to whom the laws do not expreſsly refuſe it.

Let us examine, then, what relates to the exception of age, according to theſe two principles, and let us ſee what is preſcribed upon this general exception by the civil law and by uſage.

In the *Roman* law, there was only one diſtinction upon this ſubject, which was between the perſons who had or had not attained the age of puberty; becauſe, at the age of fourteen, perſons were capable of making teſtaments, and of executing all kinds of contracts by themſelves, and conſequently, of being witneſſes of the actions, the engagements, or the laſt diſpoſitions of others.

Amongſt us, as the age of diſpoſing of property by teſtament is much more advanced, there is a diſtinction between two kinds of witneſſes.

The one are called *inſtrumental* witneſſes, that is, thoſe who atteſt the truth and faith of written acts. Parties may chuſe theſe as they pleaſe; but, becauſe their functions approach to thoſe of notaries, and as they divide with them the confidence of the law, it is not ſufficient for them to have attained the age of puberty, but it is requiſite that they ſhall be of ſufficient age to make a teſtament. The capacity of the witneſs ought to follow and imitate that of the teſtator; a maxim which is too familiar to require any proof.

The others are witneſſes of the ordinary actions of life, fortuitous witneſſes preſented by chance, and who cannot be choſen by the perſon producing them, witneſſes which the law has been obliged to admit with more facility than the others, to prevent the proof of facts being rendered impoſſible; and theſe may be of two kinds, perſons of the age of puberty, and perſons under it.

(*a*) Viz. the Roman law.

From the moment of attaining the age of puberty, it would be impoſſible to find any law, or ordonnance, or judgment, or writer, who excludes them from giving teſtimony, and therefore none has been cited.

Before the age of puberty, the caſe is more difficult; the ordonnance permits the judges to receive them even in criminal proceedings, where the favour of abſolution, or the importance of proof ought to render it more difficult, with a reſervation of afterwards examining the nature and quality of their depoſitions.

Henée reſults an invincible argument, that there can be no difficulty with regard to thoſe who are of the age of puberty; and therefore this doubt has never been ſeriouſly propoſed.

Upon what then have they doubted? Upon a queſtion which might ariſe in this cauſe—*an pubes factus poſſit teſtari de eo quod vidit in pupillari ætate?* The gloſs of the civil law upon the § 6.—*Tyles* INSTIT *de teſtamentis ordin*, has decided in the affirmative. *Maſcardus*, one of our moſt excellent practiſers, decides in the ſame manner.

For ourſelves, we are of opinion, that it ought to be reſtrained to thoſe who approach the age of puberty. This is the opinion of *Jean André*, a famous interpreter of the canon law. Thus, witneſſes are either inſtrumental or not. In the firſt caſe, the age of 20 is neceſſary; in the ſecond, that of puberty is ſufficient; and a witneſs who has attained that age may depoſe to what he has ſeen ſhortly before his attaining it.

But this queſtion is at preſent immaterial. Only two witneſſes were under the age of puberty at the time to which they depoſe, and their teſtimony is not of ſufficient importance to detain us longer in the diſcuſſion of it.

Let us proceed to the general exception of poverty, and examine it as it applies to the law and to the fact.

1. How is it to be conſidered in point of law?

The law 3 *ff. de teſtibus*, places poverty as amongſt the qualities which the judge ought to examine in the perſon of witneſſes; but it joins, at the ſame time, the character of the witneſs, his manners, his conduct. It ſays, at firſt, that the judge ought to conſider *an egens ſit.* He does not ſtop there, but adds, *ut lucri cauſa quid facile admittat.* Poverty, then, is not ſufficient; it muſt be a poverty which, with all the circumſtances that accompany it, makes it eaſy to preſume, that the witneſs is capable of all kinds of crimes, provided the hope of gain be held out to him, *ut lucri cauſa quid facile admittat.* Thus we ſee, that the gloſs ſays expreſsly, that perſons in a ſtate of poverty are often admitted, *quia*

non

non tam ex facultatibus quam ex fide teſtis idoneus æſtimatur et inſpicitur cujus propoſiti ſit.

What was ſtated to you of the property that was requiſite with the *Romans* to exclude the exception of poverty, does not relate to witneſſes but to accuſers, who were not allowed to inſtitute an accuſation unleſs they had at leaſt 50,000 ſeſterces.

But becauſe, in general, it is difficult to make this inquiry as to the manners, the character, the reputation of a witneſs, where the parties do not allege any preciſe fact, and confine themſelves to the general exception founded upon poverty; our doctors and our uſage reſtrain this exception to the ſingle caſe of mendicity, which forms a ſtrong preſumption of the venality of a witneſs. This is the doctrine of *Maſcardus*: if a man goes from door to door, *æſtiatim*. This is the opinion of *Le Brun*, in the book intitled *Procès civil et criminel*: we often find more probity and fidelity in poverty than in affluence.

Let us proceed to the particular facts.

1. There is no proof of the miſconduct, the doubtful character, the venality of any witneſs.

2. No proof of mendicity.

3. What proof is there even of poverty? A certificate that they were not in the rolls of capitation; but this is a very equivocal proof. Perſons are often omitted through influence or negligence, or a feigned poverty.

And, laſtly, this exception would only remove the teſtimony of ſix or ſeven witneſſes, whoſe depoſitions are not conſiderable.

Let us enter at preſent into the details of particular exceptions.

Theſe have been properly divided into four claſſes: decrets (*a*), law-ſuits, animoſities for favours refuſed, a ſtrong attachment for the *Prince de Conty*.

FIRST CLASS OF EXCEPTIONS.

Decrets.

Theſe are alleged againſt *Martineau*, *Du Perron*, *Le Geai de Chateaufort*, *Jouanne*, and his wife *Fouilleuſe*, five of the witneſſes.

Martineau.—The exception againſt him muſt be diſallowed. The decret was purged in 1688. The ſentence only pronounced a compenſation of expences. The matter in diſpute was only a trifling quarrel.

(*a*) Warrants for apprehenſion on a criminal charge.

Le Geai de Chateaufort.—It is pretended that there is an equivocation in the name; but this is very immaterial, for the witneſs is of ſlight importance.

Jouanne and his wife.—Five decrets have been adduced: we have examined them all. There is an aſſignation to be heard, a perſonal adjournment, an order for an arreſt. But what do we find on the other ſide, upon one of the decrets?—a ſentence which purges it, and condemns *Jouanne* in three livres reparation.

Upon another, a ſentence given in favour of the wife, and condemning the oppoſite party; upon the three others, compromiſes which liquidate the damage and coſts at very moderate ſums.

As to the foundation of theſe proceſſes, it was merely a quarrel between two neighbouring inn-keepers, each of them wiſhing to get the cuſtom of perſons paſſing by. The accuſations were very trifling; but it is ſaid the public are not ſatisfied, and our miniſtry is appealed to.

And do they not know the preciſe diſpoſition of the article 19, of title 25, of the ordonnance of 1670, which enjoins, indeed, the king's procurator to proceed againſt thoſe who are charged with capital crimes, or others ſubject to corporal puniſhment, notwithſtanding any compromiſe between the parties; but, at the ſame time, directs that, with regard to all others, the compromiſe ſhould be executed without any proſecution.

Now what was the matter in the caſe in queſtion? Some blows that paſſed between the ſervants of two inns, on account of ſome gueſts, which the one wiſhed to have to the prejudice of the other. Nothing could be more ſuſceptible of accommodation between the parties.

Fouilleuſe.—This is an important exception, becauſe the depoſition is important; and, beſides, the decret is not purged: but it muſt be conſidered in point of law, and in point of fact.

As a general principle, it is not true that the ordonnance has decided that a decret, in all caſes, without diſtinction, is a ſufficient exception.

The ordonnance, in truth, does not permit this fact to be alleged as an exception, without ſupporting it, and producing the decrets; but it leaves it to the prudence of the judge to examine the circumſtances which accompany the decret, in order, afterwards, to decide whether the exception is available or not.

Now what is the diſtinction which ought to be followed on theſe occaſions?

Either the accuſation is in its nature grave; and then the preſumption is againſt the accuſed, until he has purged the decret.

He

He cannot before be conſidered as a man *integræ famæ, et vitæ inculpatæ.*

Or, on the contrary, the nature of the accuſation is ſlight, and could not produce any puniſhment capable of impoſing the ſlighteſt ſtigma; and, in this caſe, it would be unjuſt for the decret to have more effect than the ſentence itſelf.

In regard to the fact, two things are to be conſidered:

One, the nature of the accuſation: they would repreſent it as a rape (*a*); but in the plaint which is before us, and contains a detail little ſuitable to the dignity of this audience, it only amounts to a mere debauch, preceded, as it is alleged, by promiſes of marriage; but that is a uſual colour.

Conjugium vocat; hoc prætexit nomine culpam. *Virg. Æn.* lib. iv.

It is not the relations of the girl, but herſelf, and ſhe alone who complains—ſo there is no appearance of rape.

But what diſſipates any ſuſpicion is, that we do not ſee that there has been any purſuit from the time of iſſuing the decret to the preſent,—an entire and profound ſilence.

2. The particular circumſtances of this affair.

Firſt Circumſtance. The decret was never executed; and let us not ſuffer any ambiguity upon the ſignification of it. It is very well known a decret for taking a perſon in cuſtody is not in itſelf a matter of notoriety, it is nothing unleſs it is executed, or a proclamation is made for the perſon, and an inventory taken of his effects. Here there are none of theſe proceedings; if there had been, they would have been produced—therefore *Fouilleuſe* had no legitimate and judicial knowledge of this decret; how then could he purge himſelf from it?

Second Circumſtance. The marriage of the girl, ſince the decret, which has indirectly extinguiſhed the accuſation; ſhe had more intereſt in not proſecuting than he had in not being proſecuted; and how could *Fouilleuſe* himſelf have purged the decret without diſhonouring her, and troubling an accordant marriage? What can be imputed to him under ſuch circumſtances?

Third Circumſtance. What would have been the termination of ſuch a ſuit? *Fouilleuſe* would have entered an appeal—he would have been condemned to have paid ſome trifling ſum of money to a charity, and ſome damages. Such condemnations do not induce any brand of infamy—he would have remained *integræ famæ.* Can the decret, then, have more effect than a condemnation?

(*a*) According to the law of France, the term rape was applied not only to violence, but alſo to ſeduction, and even to inveigling a perſon into an improper marriage.

SECOND

SECOND CLASS OF EXCEPTIONS.

Law-ſuits, or Cauſes thereof.

This is an exception which is good in general; but it ought not to be abuſed. It is neceſſary that it ſhould be a ſerious, real conteſt, capable of exciting hatred and animoſity, and not a law-ſuit which is only ſo in name—an affected one, at leaſt in its duration, for the purpoſe of forming a matter of exception.

Againſt whom is this kind of exception taken?

1. Againſt *Deſgourreaux.*—But this is a ſuit which might be agreeable to *Madame de Nemours*, as it tended to confirm the ſecond teſtament, by which ſhe impeaches the title of the *Prince de Conty*; a ſuit which did not prevent the officers from keeping up a correſpondence with him, and writing to him the day after your confirmation of the former ſentence, to come to Paris, and appear as a witneſs for *Madame de Nemours.*

2. Againſt *Foillard.*—This exception is more plauſible. He will have the ſame cauſe of ſuit as the *Prince de Conty* in ſupport of the firſt teſtament, in which he is a legatee of an annuity of twelve hundred livres; whereas he is only entitled to a ſum of 4800 livres in the whole, under the latter; and, beſides, he is named a teſtamentary executor.

As to the quality of executor, that is a charge, or at moſt no honour, which he has not accepted. There is no appearance of his accepting it; but, on the other hand, it is a circumſtance which proves the probity of the witneſs, and the confidence which was placed in him.

As to the difference of the legacies, *Madame de Nemours* has no intereſt in oppoſing the argument which would apply againſt ſeveral witneſſes in her own inqueſt; but the difference is not conſiderable to a perſon advanced in years. Some would take the annuity, others the legacy, according to the ſtate of their family.

We are not to include here any thing concerning the arrears of an annuity, which he has independent of the two teſtaments.

Add his known probity.

3. Againſt *Dafflon, le Leu, Mademoiſelle le Baſtier*, three domeſtics of *Madame de Longueville*, to whom ſhe has given life annuities by her teſtament.

What is this ſuit? An aſſignation both to the *Prince de Conty* and *Madame de Nemours*, as heirs, perſonally, and by way of hypothecation, upon the effects, for the payment of the annuity.

What oppoſition can there be to this demand? It is agreed before

fore you that *Madame de Nemours* was liable for her part; and can it be diſputed that ſhe was liable by way of hypothecation for the whole?

This aſſignation was made on the 19th of *Auguſt*, 1694, it is referred to the court of *Requêtes du Palais*; and there no oppoſition is made to it. In the mean time the cauſe proceeds between the *Prince de Conty* and *Madame de Nemours*. The ſentence, which allows a proof by witneſſes, is confirmed the 10th of *January*, 1696; and no defence is made againſt the demand of theſe three perſons, until the 19th of *January*, the day on which the *Prince de Conty* begins his examination.

And what is the defence? It is reduced to theſe words. *Not receivable and unfounded.* Does ſhe offer to pay her part? Does ſhe contend that it is already paid? Nothing of the kind. But *Madame de Nemours*, it is ſaid, has been obliged to pay the whole? What is the conſequence of that? A recourſe againſt the *Prince de Conty*, and not an exception againſt the witneſſes.

THIRD CLASS OF EXCEPTIONS.

Animoſities for favours refuſed.

This exception is propoſed againſt three of the witneſſes, *Grappin*, *Deſgourreaux*, *Tiſſier*.

With reſpect to *Grappin*, they have given in evidence a letter, by which he requeſts the wardrobe of the *Abbé d'Orleans*, and a gratification.

But does it appear that they were refuſed to him? By no means, and beſides what would be the conſequences?

Could not a *valet de chambre* requeſt a recompence for his ſervices, from the heir of the *Abbé d'Orleans*, without rendering himſelf incapable of declaring what he knew reſpecting the ſtate of his maſter.

Deſgourreaux. He requeſted a gratification in lieu of an equipage. He requeſted *Guilloin* to preſent a petition. He wrote on the 13th *April*, 1695, to aſk for the payment of his ſalary, and he ſtates himſelf to be very ſorry, that *Madame de Nemours* was ſo long in determining, and that he wiſhed to know what charge there was againſt him, having nothing to reproach himſelf with.

We may make the ſame obſervations upon this exception as upon the preceding; it would be difficult on ſuch account to find fault with an ancient domeſtic; does it appear that the requeſt was refuſed? On the contrary, you ſee that they endeavour to conciliate him, by letters written immediately after you confirmed the ſentence, admitting the proof.

Father

Father *Tiſſier*. A diſtinction muſt be made between the letters, which are admitted, and the placets, which are diſavowed.

In the letters he requeſts nothing for himſelf, but merely the payment of one year's ſalary, which was due to his brother; a chalice and ſome books for the *Abbey of St. George's*. There is one in which he ſays, that he wiſhes his requeſt may ſucceed, ſo as to ſpare him the chagrin, which the ſequel of this affair might cauſe him; terms which have no reference to the pretended menaces, which he is ſuppoſed to have thrown out.

It is true that in the placets, which it is pretended were joined to the letters, he requeſts the continuation of a penſion of 500 livres, which *Madame de Longueville* cauſed to be given him during the life of the *Abbé d'Orleans*, but beſides that theſe placets are neither acknowledged nor ſigned, can it be ſuppoſed that a prieſt, that the member of a religious ſociety, honoured with moſt of the conſiderable employments of his order, that an old man of 78, about to appear before the ſupreme tribunal of the ſovereign judge, would, out of revenge for ſuch a refuſal, commit a perjury in the face of juſtice, and render himſelf guilty of the blackeſt falſehood that ever was committed, as he is not content with atteſting the inſanity of the *Abbé d'Orleans*, but he muſt add an infinity of circumſtances, which would be an aſſemblage and multitude of crimes combined in one.

Let us finiſh what regards thoſe three witneſſes, by three reflections common to them all.

1. They are witneſſes who are almoſt abſolutely neceſſary. It would require very ſtrong arguments to reject them.

2. By deferring to grant the favours which were requeſted, they might be reduced to the impoſſibility of depoſing againſt *Madame de Nemours*, for it might be expected either that they would not depoſe at all, for fear of loſing the fruit of their ſervices, or at leaſt that, if they did depoſe, their depoſitions might be rendered uſeleſs by aſcribing them to the refuſal of theſe favours.

3. If we attend to probability, in obſerving the favours which were demanded on one ſide, and deferred on the other, and ſeeing the witneſs in ſuſpence until after his depoſition, will it not be moſt natural to conclude, that it was not the refuſal of the favour which induced the depoſition, ſince the favour was not as yet refuſed, but on the contrary, that it was the depoſition which induced the refuſal?

Let us proceed to examine, the

FOURTH

FOURTH CLASS OF EXCEPTIONS.

Attachment to the Prince de Conty.

This laſt exception relates to *M.* and *Madame de Billy*. We are of opinion it ought not to have been propoſed.

It is pretended that they are officers of the *Prince de Conty*, becauſe they are keepers of the *Chateau de Trie;* which belongs to him.

The teſtament of *Madame de Longueville* diſſipates this colour.

She gives to *de Billy* and his wife, a habitation in the *Chateau de Trie*, with the appointments amounting to 400 livres a-year, and in caſe her heirs ſhould diſpoſſeſs them, which ſhe does not think likely, and requeſts them not to do, ſhe directs the ſame ſum to be paid to them during their lives.

They are not then officers of the *Prince de Conty*, but legatees of *Madame de Longueville.*

They do not even enjoy the habitation, but reſide upon a neighbouring eſtate.

All the right of the *Prince de Conty* would conſiſt in taking away from them this habitation. He might do ſo in legal ſtrictneſs, but there are ties of honour and propriety in the requeſts of *Madame de Longueville*, which, amongſt perſons of this rank, may have all the effect of obligation and command.

It is added with reſpect to *Madame de Billy*, that ſhe has aſſumed the quality of lady of honour to *Madame de Longueville*, but in fact, ſhe performed the functions of that ſituation, and how does ſhe expreſs herſelf reſpecting it? She ſays, that ſhe ſerved *Madame de Longueville* in quality of lady of honour. Such exceptions are too vague to weaken depoſitions of this importance.

We have not taken notice of the fact of the *Chalice*, purchaſed by *Foillard*, nor of the gift which *Deſgourreaux* received from *Abbé d'Orleans*, at the time when they now repreſent him to have been in a ſtate of imbecility; becauſe theſe are contradictions of their teſtimony, of which we ſhall have to ſpeak in the ſequel, rather than in examining the exceptions.

Such are the exceptions then which are taken on the part of *Madame de Nemours.* They are reduced to ſome ſuſpicions againſt *Foillard*, on account of ſome difference between the legacies in his favour, and the two teſtaments; and to diſallowing the two witneſſes, who were under the age of puberty, together with *le Geai de Chateaufort.*

Let us now paſs to the eaſy and ſummary examination of the exceptions which the counſel of the *Prince de Conty* have propoſed againſt the witneſſes of the oppoſite ſide.

Let us firſt attend to what they have ſaid, concerning the depoſition of the moſt illuſtrious witneſs, in the inqueſt of *Madame de Nemours*. It is unneceſſary to add the name of the late *M. le Nain, Maitre des Requêtes.*

We avow, and the public will do us the juſtice to be perſuaded, that we grieve to feel ourſelves reduced to the painful neceſſity of examining the general ſuſpicions by which they would offer to weaken the authority of a witneſs ſo worthy of our veneration.

It ſeems as if we were obliged to examine a reproach againſt virtue itſelf; virtue which a long life has conſummated, and which a precious death that appeared premature, though at the age of 80, has conſecrated to immortality.

Why is it not permitted to us, inſtead of entering into a diſcuſſion of this exception, to render to the illuſtrious perſon who is now no more, the tribute ſo juſtly merited of a ſolemn effuſion of praiſe, which, coming from us, would be conſidered rather as an effuſion of the heart, than as a production of the mind. We ſhould repreſent him to you in the temple of juſtice, where his ardent zeal for truth, and his immoveable firmneſs in well doing, have frequently given conſolation to innocence, and cauſed iniquity to tremble. We ſhould ſhew him unto you at the foot of the altar, joining the example of a perfect chriſtian to the accompliſhed model of a righteous magiſtrate. We ſhould follow him in the ſplendid obſcurity of his retreat, where we ſhould ſee him nearer to heaven than to earth, receiving the benedictions which the ſcripture (*a*) has promiſed to the upright man, and in a happy old age, beholding the children of his grand-children, more loaded with merits than with years, ſleep the ſleep of the juſt, and living even after his death, not only in the remembrance of him which will ſubſiſt for ever, but ſtill more, in the worthy heirs of his name, his fortunes and his virtues.

But whatever gratification we might have in rendering this public homage to his memory, we are obliged to confine ourſelves within much narrower limits; let us renounce what might flatter the ſentiments of our hearts, and not loſe ſight of the principal object, which we are this day to contemplate. Let us examine the indirect exceptions, which have been propoſed in the moſt delicate manner, but which ſtill have been propoſed againſt *M. le Nain.*

We are not ſpeaking here of the interpretation which has been given to his depoſition. We are now only conſidering the qua-

(*a*) Ecce ſic benedicetur homo qui timet Dominum, & videas filios filiorum tuorum.

lities of the witneſſes, and not the inferences which are to be drawn from their teſtimony.

What is it then that is ſtated to you? that from the confidence with which *Madame de Longueville* honoured *M. le Nain*, that from the place which he held in the councils of *Neufchatel*, he ought to be regarded as one of the principal authors of the acts which were ſigned by the *Abbé d'Orleans*. That his fidelity, being engaged by the counſels which he had given, did not allow him to expreſs himſelf in his depoſition clearly, and in a manner, which might impeach the acts, that were equally juſt and neceſſary.

We know that a judge cannot depoſe againſt the ſentence which he has himſelf given; a notary againſt the act which he has received; an advocate againſt the tranſaction which he has adviſed.

But what proofs are there, that *M. le Nain* is to be conſidered as the author of the inſtruments which were executed by the *Abbé d'Orleans?* It is known in general, that *Madame de Longueville* frequently conſulted *M. le Nain*, which was a mark of the diſcernment and elevation of mind, that belonged to that great *Princeſs*. But can we conclude from this fact, that he took ſuch a part in the inſtruments, that he could not depoſe againſt them, without indirectly deſtroying his own productions?

Can we look for a greater proof than his depoſition itſelf, that his fidelity was not engaged by theſe inſtruments? Would he have depoſed in this affair, if it was true that the confidence of *Madame de Longueville* had rendered him the only arbiter of the conduct of the *Abbé d'Orleans*, upon this occaſion? If we were inquiring reſpecting any other perſon, we ſhould examine firſt, what he ought to have done, and next, what he had done; but let us be permitted to reverſe this order, with reſpect to the great magiſtrate, concerning whom we have the honour to addreſs you. Let us ſay, *M. le Nain* has done it, therefore he might do it, therefore he ought to do it. In this ſentiment we believe that all the public will accord with us, and therefore we conclude what relates to the quality of this witneſs; intending hereafter to give our opinion at length upon the nature of his depoſition.

The remainder does not require a long examination.

David is not exceptionable; it is pretended that the *Prince de Conty* having removed him from the place of ſecretary, in 1685, he retained his reſentment in 1696.

But that is hardly probable.

Pervis is a witneſs, who appears almoſt neceſſary.

But there are two great obſtacles to the admiſſion of his teſtimony.

1. He

1. He is a legatee of 8000 livres, by the laſt teſtament, and has nothing by the firſt.

2. He is a domeſtic of *Madame de Nemours*, a warden of one of her *Chateaux*. The witneſs muſt then be diſallowed.

The remainder of this audience was employed in reading the depoſitions of the witneſſes.

THIRD AUDIENCE.

After having recited the facts and the arguments of the parties in the firſt audience, after having laid before you the two contrary hiſtories of the life of the *Abbé d'Orleans*, by the depoſitions of the witneſſes which were read in the ſecond audience, a crowd of queſtions now preſent themſelves before us, which are to be the matter of our examination, and the important ſubject of your deliberation.

Permit us, Sirs, that we may not be intimidated by their number and extent, to contemplate them ſeparately, and in order to make a proper diſtribution, to divide this cauſe into two parts, with reference to the two teſtaments which form all the difficulty of it.

Let us examine, in the firſt place, the firſt teſtament in itſelf; let us ſee if it is true, as you have been told, that independantly of the acts which follow it, it includes in itſelf the cauſe of its ruin and the principle of its deſtruction.

Let us compare it afterwards with the other acts, and particularly with the donation, and the ſubſequent teſtament, by which it is ſaid to be defeated. In a word, let us reſume the plan and rule, which we purſued upon the interlocutory proceeding for the examination of this great cauſe. Has the firſt teſtament become void in itſelf? That is the firſt queſtion—Is it revoked? That is the ſecond. We ſhould be happy if the deciſion was as ſhort, and as eaſy as the propoſition.

The whole examination reſpecting the caducity of the firſt teſtament is reduced to two principal points, both equally important and deciſive.

The firſt, is whether the queſtion is ſtill open? Whether it is not prejudicated clearly, certainly, irrevocably, by the authority of your ſentence?

The ſecond, is reduced to examining whether, if every thing was yet entire, it could be contended with any appearance of truth, that

that the firſt teſtament is a title which is void, ineffectual, and deſtructive of itſelf.

In order to diſcuſs the firſt point, and to decide how far the queſtion is concluded by your ſentence, permit me to repreſent the ſtate of the conteſt, which was brought before you in 1695, and 1696.

Madame de Nemours was appellant from a preliminary ſentence, admitting the *Prince de Conty* to make the proof, which he had demanded by a preciſe requeſt, and ſhe renewed upon that appeal the two principal arguments, which formed the whole of her defence in the principal cauſe; ſhe maintained at firſt, that the *Prince de Conty* had no title, becauſe the teſtament, which he alleged in his favour, was annihilated by the previous deceaſe of the inſtituted heir; ſhe added that this teſtament, inefficacious in itſelf, was revoked by a ſubſequent teſtament; and that ſuch being the caſe, the rules of juſtice could not admit the *Prince de Conty*, to make a proof ſuperfluous, illuſory, contrary to his own intereſts; ſince even if he ſhould prove the inſanity of the *Abbé d'Orleans*, at the time of the laſt teſtament, the only inference which could be deduced from ſuch a proof, would be that the *Abbé d'Orleans* was dead without a teſtament, as the firſt was of no effect, and the ſecond was made by a perſon in a ſtate of incapacity, and conſequently that the law of blood and nature would have given the ſucceſſion to *Madame de Nemours*, his only legitimate heir.

Upon the foundation of theſe two principal arguments, *Madame de Nemours* preſented her appeal; it was pleaded during twenty audiences, of which a conſiderable part was employed in ſtating the legal objections to the firſt teſtament. Our miniſtry obliged us to take the concluſion, in a cauſe ſo celebrated and ſo difficult. What was the firſt point to which we directed our attention? it was the explication of the real ſtate of the conteſt we repreſented, that the original ſentence could not be regarded as an innocent temperament with reſpect to the queſtions of law, that it had not indeed pronounced a diſtinct judgment upon theſe queſtions; but that it had decided them tacitly, ſince the *Prince de Conty* would not have been admitted to the proof which he demanded, except by deciding that he had a ſolid intereſt and a certain quality, and that that intereſt and that quality having no other foundation than the teſtament of 1668, the original judges had regarded that act as a title equally inviolable and legitimate. We even made uſe of a compariſon which is very common in the order of juſtice, and we obſerved that the queſtion of the firſt teſtament was decided in the ſame manner, that the court ordinarily decides upon queſtions

of preſcription or eſtoppel: when it is judged that a preſcription is not ſufficiently eſtabliſhed, the court frequently contents itſelf with admitting the action without giving any expreſs judgment as to the preſcription; but will it be ſaid, that the court has not judged definitively upon the preſcription by their admitting the action to which it is oppoſed? Suppoſe, for inſtance, that *Madame de Nemours* had oppoſed a preſcription to the *Prince de Conty*'s demand of being admitted to proof. If the court had, notwithſtanding, permitted the proof to be made, could it afterwards be contended that the preſcription, without having been ſpecially reſerved, could be admitted as the foundation of a freſh diſpute.

This, Sir, is what we had the honor to repreſent to you at the time of the former pleading, in order to apprize you of the importance of the ſentence which you were then to pronounce.

We entered afterwards into an examination of the queſtions of law, which occupied at leaſt one half of the long addreſs, which the extent of the ſubject obliged us to make; you pronounced that celebrated judgment by which you freely and ſimply confirmed the original ſentence, without even adding the ordinary clauſe, that it ſhould be without prejudice to the rights of the parties.

It is not for us to offer to carry our views and reflections further; we, together with the reſt of the public, reſpect that myſtery which forms ſo eſſential a part of the religion of your judgments: you alone can know, whether, in the deliberation which immediately followed upon our concluſions, you took into conſideration the queſtions of law, and whether you intended to decide concluſively upon them.

As for ourſelves, who only propoſe our reflections with trembling, and who can only derive our information from the exterior declarations of your judgment, we are perſuaded that its diſpoſition neceſſarily implies a deciſion upon the validity of the firſt teſtament.

Two reaſons, which we will mention in a ſingle word, equally perſuade us of it.

The one, that it would appear contrary to juſtice, to have admitted the *Prince de Conty* to a proof in which he would have no intereſt if the firſt teſtament no longer ſubſiſted, without having previouſly examined not only the appearance but the validity of his right, and without being perſuaded that that right being certain in itſelf did not require any proof by witneſſes, except to deſtroy the only obſtacle which could be oppoſed to it. Could it be poſſible that with any heſitation reſpecting this title, a proof would be admitted of ſo difficult a nature; that entertaining a doubt of the validity of the firſt teſtament, you would have permitted the

Prince

Prince de Conty to attack the ſecond; and that the law being uncertain, you would, without a confident aſſurance reſpecting that, have paſſed to an examination of the fact?

For in ſhort, Sirs, and this is the ſecond reaſon which perſuades us of the real prejudication of your ſentence—Was the fact, of which you admitted the proof, of any conſequence, could it be in any degree relevant to the deciſions of the queſtions of law? The point in queſtion was, whether the previous deceaſe of the inſtituted heir had rendered the firſt teſtament void, and in order to come to a judgment upon that mere queſtion of law, if it was ordained that the *Prince de Conty* might prove that the teſtator was in a ſtate of inſanity at the time of making the ſecond. Can any thing be more diviſible, more diſtinct, more independant, than theſe two queſtions? The firſt is abſolutely preliminary to the ſecond, and the ſecond is entirely uſeleſs in the deciſion of the firſt. It was not then with reference to the queſtion of law, that you admitted the proof, it was only with reference to the queſtion of fact, and this laſt queſtion could never have been examined, or diſcuſſed, or decided, without having formed a judgment upon the firſt: without that the parties would have been engaged in uſeleſs prolongations, in immenſe expence; and when they had ſatisfied your ſentence, when one of the parties had examined eighty-five witneſſes and the other ſeventy-ſix, it would have been ſaid, it is not upon the circumſtances of fact, but upon the points of law that the cauſe ought to be decided; thus the permiſſion which you had granted would be uſeleſs, dangerous, contrary to equity and to juſtice.

Such, notwithſtanding, is the ſenſe which they would put upon your judgment, and which they do not ſupport by any other reaſon than the mere name and general quality of an interlocutory ſentence. It is true, that in general, an interlocutory reſerves the rights of the parties entire, but that is upon the queſtion to which the interlocutory ſentence relates, and not upon the queſtions preliminary to it.

To expreſs ourſelves more clearly, you had to decide upon two queſtions, the one of law, which conſiſted in determining whether the firſt ſentence was valid; the other of fact, in which it was to be decided whether the ſecond was competent to revoke it. Was it upon the firſt queſtion that you paſſed the interlocutory ſentence? was it to decide this queſtion of law that you allowed the examination of 160 witneſſes? The mere propoſition is abſurd: upon what then did the interlocutory ſentence turn? upon the queſtion of fact, that is reſerved and remains entire, but the firſt is decided, as it was abſolutely preliminary to the ſecond.

We might diſpenſe with entering anew upon the diſcuſſion of the queſtions of law, upon which we probably occupied too great a portion of your time upon the former pleading; but as we ſhall always diſtruſt even evidence itſelf, until it is confirmed by the authority of your judgments, we ſhall ſhortly recapitulate what we have already ſtated more at length upon theſe queſtions; we ſhall examine the new arguments which are ſaid to be now brought forward, and we ſhall endeavour very ſummarily to ſhew that even if the ſubject was entire it would be ſtill proper to decide in favour of the validity of the firſt teſtament.

[*After a recapitulation of the former arguments in ſupport of the title under the firſt will, he proceeded as follows:*]

Againſt ſo many reaſons fortified by the unanimous ſentiment of the doctors, without its having been found poſſible, ſince the cauſe was before diſcuſſed, to diſcover even one who entertains the contrary opinion, except in the caſe of paſſing over a child, which is the only vice in the ſubſtance conſidered by ſome as not admitting of reparation by the codicillary clauſe: Againſt all theſe principles we ſay an objection has been made which is pretended to be abſolutely new, although we had indirectly refuted it upon the former hearing.

And ſee in what this objection conſiſts. It is ſo ſubtle, and, we may add, ſo contrary to all natural ideas, that we are not afraid of requeſting a renewal of your attention in bringing it particularly before you.

We muſt neceſſarily ſuppoſe the caſe to which the law applies before we repeat the terms of it. A perſon in contemplation of death, makes a diſpoſition which only amounts to a codicil, in which he charges his preſumptive heir with a *fidei-commiſſum*. He dies, his heir repudiates the ſucceſſion, which paſſes to the heir of the ſecond degree. It is aſked whether this heir takes its ſubject to the *fidei-commiſſion?* If, without going further, we were to aſk the generality of mankind their opinion upon this queſtion, we do not doubt but they would all anſwer, that if there were no particular circumſtances, it ought to be decided that the charge of the *fidei-commiſſion* was communicated and extended to the ſecond degree. But it is ſaid, the law decides the contrary, and in fact it has the appearance of ſo deciding. Theſe are the terms of it:—

« *Illud certe indubitatè dicitur, ſi quis inteſtatus decedens, ab eo qui primo gradu ei ſuccedere potuit fidei-commiſſum reliquerit, ſi illo repudiante, ad ſequentem gradum devolutus ſit ſucceſſio, cum fidei-commiſſum non debere, et ita imperator noſter reſcripſit.* L 1. § 9. *ff. de legat.* 3.

But how is that law applicable to the preſent cauſe? you have been told that at the time of the teſtament, which it is ſaid could only

only affect the moveables and the acquiſitions, *Madame de Longueville* was the preſumptive heir and in the firſt degree. Now it was ſhe whom the *Abbé d'Orleans* charged *nominatim* with the *fidei-commiſſion*; then this charge does not paſs to *Madame de Nemours*, who afterwards becomes heir of the firſt degree.

But in the firſt place they have not taken notice, that when the law ſpeaks of the firſt and the ſecond degree, it ſpeaks of them not with reference to the time of the teſtament, which amounts to nothing in fixing the proximity of the heirs, but with reference to the time of the death. Then as *Madame de Nemours* was not only the neareſt but the only heir at the time of the death, ſhe ought to be charged with the *fidei-commiſſion* even by the very terms of this law.

But without reſting ſatisfied with this firſt anſwer, let us obſerve in the ſecond place, that we muſt not overlook the learned, the judicious, and the juſt commentary, which the *Preſident Faber* has made upon this law. He has examined it in the fifteenth chapter of the fourth book of his *Conjectures*, and he demonſtrates irreſiſtibly, that we muſt reject the negation of this law.

There are two principal reaſons for his opinion.

1. The juriſt *Ulpian* would contradict himſelf, and that in one and the ſame law. For in the § 7 *, he eſtabliſhes the principle, that the heir in the ſecond degree may be charged with the *fidei-commiſſion* in the ſame manner as the firſt, and in the § 9, which is that whereof the terms have been ſtated to you, he would decide that the heir in the ſecond degree would not be charged, as if it was not always to be preſumed when there are no circumſtances to the contrary, that the teſtator intended to that which was in his power, and that he could never have it in his contemplation to make the *fidei-commiſſion* depend upon the uncertain event of the acceptance of the inheritance by the heir of the firſt degree. That would not be the only contradiction with which *Ulpian* would be charged. He decides in the law 61 *de legat* †. That if only one of the legitimate heirs was charged with the *fidei-commiſſion*, his replication would not prevent the *fidei-commiſſion* being due from his co-heir to whom that part would accrue, *et hic quaſi ſubſtitutus cum ſuo onere conſequetur ad creſcentem portionem.*

* Nec tantum proximi bonorum poſſeſſoris, verum inferioris quoque fidei-commiſſum poſſumus.

† Si Titio & Mævio heredibus inſtitutis, qui quadringenta relinquebat, a Titio diſcenta legaverit, & quiſquis heres eſſet, centum, neque Mævius hereditatem adierit trecenta Titius debebit. § 1. Julianus quidem ait, ſi alter ex ilgitimis heredibus repudiaſſet portionem, cum eſſent ab eo fidei-commiſſa relicta, coheredem ejus non eſſe cogendum fidei-commiſſa præſtare portionem ealem ad coheredem ſine onere pertinere, ſed poſt reſcriptum Severi, quo fidei-commiſſa ab inſtitutis relicta, a ſubſtitutis debentur, & his quaſi ſubſtitutus cum ſuo onere conſequetur ad creſcentem portionem.

Now if the co-heir whom the teſtator had not charged, is notwithſtanding bound, why ſhould the heir of the ſecond degree be exempt, ſince the teſtator according to *Ulpian* might have charged the ſecond degree in the ſame manner as the firſt? Does not even the compariſon of the ſubſtituted heir agree perfectly with the heir of the ſecond degree, when the heir of the firſt degree renounces the ſucceſſion?

2. In the paragraph which is adduced on the part of *Madame de Nemours*, the juriſt adds, that the emperor had ſo decided. Now on the one hand it is certain that this abſurd deciſion is no where to be found; and we find on the contrary in law 61, which we have juſt cited, an oppoſite deciſion, for *Ulpian*, in obliging one co-heir to perform the *fidei-commiſſion* which was impoſed upon another, ſays, that that cannot admit of any difficulty ſince the reſcript of the emperor. See then what is the reſcript which is mentioned in the law that we are examining, a reſcript very famous in the writings of the juriſts upon this ſubject, by which *Severus* and *Antonine* decided that the co-heirs and ſubſtitutes ſucceeded to the charges in the ſame manner as to the effects; a proviſion which was extended ſoon afterwards to legitimate ſucceſſions.

Such are the grand and ſolid foundations of the opinion of *Faber*, an opinion which appeared ſo juſt to *Denys Godefor*, that he is content with referring the reader to that learned interpreter, as intimating where he is to ſeek for the true interpretation of this law.

But it is not neceſſary to make any retrenchment from the law. Let us ſay with the gloſs, with *Bartolus*, with all the *Italian* expoſitors, that it ought to have effect in one ſingle caſe, that is where *nominatim relictum eſt*, ſo that *unicus heres videatur oneratus*, in which caſe the *fidei-commiſſion* is merely perſonal.

But is that the caſe here? They have confounded two different clauſes, the clauſe of inſtitution, and the codicillary clauſe. It is true, that in the clauſe of inſtitution, *Madame de Longueville* is charged by name; but it is not by that clauſe that we hold the legitimate ſucceſſors to be charged with the *fidei-commiſſion*, it is by the codicillary clauſe which charges the legitimate heirs in general.

Let us go further, and endeavour to ſhew, that it is ſo far from true, that *Madame de Nemours* is not compriſed in the codicillary clauſe as legitimate heir, that it is almoſt impoſſible to refer that clauſe to any other perſon, and that ſhe is charged with the *fidei-commiſſion* almoſt by name.

Let us purſue our original ideas: the codicillary clauſe is a prayer addreſſed to the legitimate heirs. The *Abbé d'Orleans* had only three of that deſcription, the *Comte de St. Pol*, *Madame de Longueville*, *Madame*

Madame de Nemours. He addreſſes the two firſt in the inſtitution. He charges them by name with the *fidei-commiſſion*, in favour of the *Princes de Conty*. He addreſſes himſelf to the laſt in the codicillary clauſe. Why? Becauſe one of the principal cauſes for which that clauſe is ſubjoined, is that of the caducity of the inſtitution; that is to ſay, the previous deceaſe of the two inſtituted heirs. Then there is a caſe in which he ſuppoſes that the two firſt heirs will not to be in a condition to hear his prayers and obey his words, and notwithſtanding he continues to pray, and to make his voice be heard. To whom then can he addreſs himſelf? If it is true, that his object is his legitimate heirs, and that two of them are ſuppoſed to be dead, is it not evident that he can only regard the third heir, the only one who exiſts; that is to ſay, *Madame de Nemours;* and that conſequently, as we have already ſaid, ſhe is almoſt by name charged by the teſtator.

But if this teſtament cannot be regarded as having failed of its effect, as it is ſupported by the codicillary clauſe, is it then revoked by the donation, or by the ſubſequent teſtament? This is the ſecond part of the cauſe.

The donation forms a queſtion of law, but one which is uſeleſs; the teſtament, a queſtion of fact, but eſſential.

We ſay, that the donation forms an uſeleſs queſtion of law, for to what is it reduced? To decide whether, according to the rules of law, an univerſal donation of preſent effects revokes an antecedent teſtament.

Two grounds have been ſtated. The incompatibility of the titles, but that is a propoſition contrary to ſound juriſprudence; the donation diminiſhes the profit of the ſucceſſion, but it does not affect the ſubſtance of the inſtitution; but beſides, here is a conditional donation, the right of reverſion always continued a property in the donor; could that have been oppoſed to the *Comte de Saint Pol?*

Second ground, change of intention, that might form a difficulty, not that it is true, that the property having been given without any charge to the *Comte de St. Pol*, it would not be again ſubject to the charge in reverting to the donor; but principally on account of the clauſe inſerted in the donation, and which reſerves the right of retinue to *Madame de Nemours* after the *Abbé d'Orleans*, a very ſtrong preſumption, to which, as it ſeems, nothing could be oppoſed except the ſtrictneſs of the law; but ſuch a preſumption notwithſtanding does not in itſelf deſtroy a teſtament. For inſtance, could this point be oppoſed to *Madame de Longueville* the inſtituted heir? Now from the inſtant that the inſtitution is admitted to ſubſiſt, the *fidei-commiſſion* which is attached to it ſubſiſts alſo. She

could not take the effects without the charge of reſtitution; ſhe could only receive them to render them according to the diſpoſition.

But once more, after having reduced this queſtion to its real difficulty, let us ſay as we have ſaid upon the former occaſion, that before we examine what was the will of the *Abbé d'Orleans*, we muſt be aſſured that he had a will; now this is the very queſtion in diſpute, ſince the time of the donation is three days before that of the teſtament, and when it is contended that the *Abbé d'Orleans* was in a ſtate of inſanity.

And in order to evince ſtill further the inutility of this queſtion, let us ſay in one word, either the donor was in a ſtate of ſanity, and then why look for conjectures of his intention; and whether he did or did not mean to revoke the firſt teſtament by the donation? Can his intention be doubtful if his ſanity was certain? Is it not written in his teſtament, which followed the donation? Or on the contrary, he was in a ſtate of inſanity; and in that caſe how could he change his intention, not having any to change? We ſhall examine in a moment the acts by which it is pretended the donation was confirmed. Let us reſt the point upon this ſingle reaſon, the fact is always deciſive. If he was ſane, the ſecond teſtament proves that he intended to revoke the firſt. If he was inſane, he could not revoke it either by the donation or the ſecond teſtament.

At length we are arrived at the deciſive point, and the real knot, at the eſſential queſtion, we might almoſt ſay the only queſtion of this long conteſt. Hitherto we have treated of ſeveral queſtions, which might appear more proper to ſatisfy the inclination or the prejudices of the parties, than to *enlighten the religion of the judges*; and carrying our exactneſs even to a ſcruple, we have deemed it not allowable to retrench any part of the cauſe by a kind of premature judgment and anticipated cenſure. We have preferred expoſing ourſelves to the imputation of ſaying things which might be uſeleſs and ſuperfluous, rather than to the reproach of having omitted any which were uſeful and neceſſary; and we are perſuaded it was our duty to repreſent at firſt this cauſe, as it appeared in the mouths of the parties, before we endeavoured to exhibit it as it ought to appear in the ſanctuary of juſtice. But after having ſatisfied in this reſpect every thing which the delicacy of our miniſtry could require from us, we enter at preſent upon the more important and difficult part of our obligations, which conſiſts in endeavouring to diſcover the light of truth from amongſt the clouds of darkneſs that encompaſs it, and to place it before your eyes not covered with thoſe extrinſic ornaments which frequently only embelliſh in order to diſguiſe; but on the contrary, diveſted of all

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exterior advantages, reduced to that natural ſtate of purity, of ſimplicity, of ſincerity, in which it ought to preſent itſelf to the eyes of juſtice.

But what is this important truth which we are in purſuit of? You know, Sirs, that all the difficulty of this cauſe is reduced to examining, whether the *Abbé d'Orleans* was in a ſtate of capacity or incapacity at the time of making his laſt teſtament? Such is the only object which we are this day to contemplate, and ſuch at the ſame time is the deplorable lot, ſuch the melancholy deſtiny of the houſe of *Longueville*, ſo illuſtrious in its origin, ſo glorious in its progreſs, ſo ſplendid in its decline, that all which remains of its paſt grandeur, is, the ſingle queſtion whether the laſt heir of ſo exalted a name fell ſix months ſooner, or ſix months later, into a ſtate of inſanity? Thus terminate the fortune and elevation of ſo many heroes. Their ſucceſſor dies an ideot, we have not, even after his death, the conſolation of being allowed to doubt the truth of his inſanity. The calamity is certain, the date of it alone is doubtful. Six months are all the ſubject of this celebrated conteſt which is paſſing before you, and the magnitude of which only ſerves to proclaim ſtill more loudly, the emptineſs of grandeur, and the inconſtancy of fortune.

But before we enter into the examination of this queſtion of fact, ſo important and ſo difficult, we think it is abſolutely neceſſary to eſtabliſh, in a few words, the general principles by which we may judge of the merit, of the force, and, above all, the preference of the oppoſite proofs. And that we may do this with order, let us firſt endeavour to find out what is in general that incapacity of the mind, which ſhould render a teſtament invalid; let us then examine how this incapacity ought to be proved. To theſe two points, the arrangement of the general principles which ought to prevail, in this laſt part of the cauſe, is reduced.

What then, if it is poſſible to define it, is that ſtate of incapacity which retrenches a teſtator from the number of citizens, and almoſt effaces him from that of men? let us not addreſs ourſelves to the ancient philoſophers for a ſolution of this queſtion: they might probably anſwer, that all men are in a ſtate of actual and perpetual inſanity, except that ſage which every ſect boaſts of poſſeſſing, but which none of them can point out to others; they would, without hèſitation, place amongſt the inſane, all who are either agitated by their own paſſions, or ſlaves to thoſe of others, and changing the common ideas of men, they would render ſanity ſtill more difficult to prove than madneſs. Let us rather conſult thoſe who have tempered the exceſs of philoſophy by experience in the affairs of the world, or by the principles of juriſprudence.

What ſays that great man, who was, at the ſame time, an orator, a philoſopher, and a juriſt? (and to compriſe more than all this,) what does the opinion of *Cicero* teach upon this ſubject?

Two different ſtates divide all men, if you except the really ſage (*a*). The one are deprived entirely of the uſe of reaſon, the others make a bad uſe of it, but there is not ſufficient reaſon for declaring them to be in a ſtate of folly; the one are deſtitute of the light of reaſon, the others have a feeble ray, which conducts them to a precipice; the former are dead, the latter ill; theſe ſtill preſerve an image, and a ſhadow of wiſdom, which is ſufficient for filling in an ordinary manner the common duties of ſociety, they are deprived of a real ſanity of mind, but can lead a common uſual kind of life; the others have even loſt that natural ſentiment, which binds mankind together by the reciprocal performance of certain duties. Let us apply ourſelves to this laſt character, which is the moſt ſenſible of all, and to which the application is the moſt eaſy.

A ſane perſon, in the ſenſe of the law, is one who can lead a common and ordinary life; an inſane perſon is one who cannot even attain the mediocrity of theſe general duties. *Mediocritatem officiorum tueri et vitæ cultum communem et uſitatum.*

But amongſt thoſe whom their weakneſs places below the laſt degree of men of common underſtanding, the juriſts diſtinguiſh two kinds.

The one only ſuffers a ſimple privation of reaſon; the weakneſs of their organs, the agitation, the levity, the almoſt continual inconſtancy of their minds, place their reaſon in a kind of ſuſpenſion and perpetual interdiction, and cauſe them to have the denomination of *mente capti*, in the laws, and in the writings of the juriſts.

In the others, the alienation of mind is leſs a natural weakneſs, than a real malady, frequently obſcure in its cauſe, but violent in its effects, and which, like a wild beaſt, ſeeks continually to break the chains that bind it, and it is this malady which properly bears the name of fury.

The former, ſays *Baldus*, have an obſcure and concealed fury, the latter have a ſtriking and manifeſt inſanity.

The laſt are in a ſtate of drunkenneſs, of tranſport, of frenzy. The firſt approach rather to the ſtate of inſanity, an extreme decrepitude, their reaſon, like that of an infant or a dotard, is imperfect or worn out, but they are both equally incapable of mak-

(*a*) The word *ſage*, being uſed in the *French* language to expreſs both the elevation of wiſdom, and a common ſtate of ſanity, has an effect in this diſcuſſion, which cannot eaſily be retained in tranſlation.

ing a teſtament, becauſe in the one reaſon is almoſt extinct, and in the other it is tied and bound by the violence of their complaint.

If theſe two ſtates agree in this point, they are nevertheleſs diſtinguiſhed by ſeparate characters.

The ſtate of fury is more violent, but it ſometimes admits the hopes of cure.

The ſtate of mere inſanity is more tranquil, but it is almoſt always incurable.

The one is ſuſceptible of paroxyſms and intervals, it riſes all at once, it diminiſhes in the ſame manner.

The other has not intermiſſions ſo marked, becauſe the cauſe which produces it, that is to ſay, the weakneſs and debility of the organs, is nearly equal and uniform.

Finally, a declared fury is ſo obvious and evident, that it would be ſuperfluous to diſtinguiſh the degrees of it, with reference to the incapacity of the teſtator, becauſe it is certain that all furious perſons, as long as their fury continues, are abſolutely incapable of making a teſtamentary diſpoſition.

On the contrary, mere weakneſs of mind is more ſuſceptible of degrees, and of conſiderable differences; the incapacity increaſes and diminiſhes, in proportion to theſe degrees, and theſe differences: but who can fix them in general, who can mark preciſely the frontiers, the almoſt imperceptible limits, which ſeparate inſanity from ſanity, who can number the degrees, by which reaſon declines and falls into annihilation?

This would be to preſcribe the limits of that which is illimitable, to give rules to folly, to be bewildered with order, to be loſt with wiſdom. The doubtful and uncertain point, at which reaſon diſappears, and where incapacity becomes evident and manifeſt; can only be fixed by the particular circumſtance of each individual caſe.

All that can be ſaid in general is, that this incapacity ought never to be examined with more attention, than in deciding not upon a mere contract, but upon that act, which of all others demands at once the greateſt degree both of capacity and will, that is, a teſtament.

The law which ſubſtitutes a teſtator in its place, which inveſts him with the power and character of a real legiſlature, which grants him the right to change, to diſcompoſe, to abrogate the natural and favourable order of legitimate ſucceſſions, requires at the ſame time from him, both a capacity proportionate to the importance of his miniſtry, and a plenitude, and if we may ſo expreſs ourſelves, of a ſuperabundance of will, and therefore, it renders

ders him capable of all kinds of contracts, previouſly to impreſſing him with capacity, neceſſary for making a teſtament.

Every body knows that perſons under the age of puberty, but approaching to that age, may contract, with the authority of their tutors; but who ever conceived that the preſence and authority of their tutor could render them capable of making a teſtament?

Minors contract amongſt us, with the hopes of reſtitution, but they make a valid contract (*a*): this is not all, the laws of the church and the ſtate give them the power of engaging themſelves, by the moſt ſolemn and indiſſoluble ties; and at the ſame time that the law permits them to diſpoſe not only of their fortune, but of their ſtate, and their liberty, whether by marriage or religious profeſſion; the ſame law declares them incapable of giving their effects by teſtament.

In the intention of legiſlatures, the progreſs of the will follows, and imitates that of the capacity (*b*) A perſon may engage himſelf by attorney; he may, by a general procuration, ſo far throw himſelf upon the fidelity of the perſon whom he entruſts, that without deſigning it, without even knowing it, he may enter into all kinds of obligations; but who will ſay that he can make a teſtament by attorney? However ſpecial the procuration may be, whatever may be the probity of the perſon entruſted with it, however wiſe the diſpoſition, the teſtament will be always null, becauſe it is not ſufficient that a teſtament ſhould be a judicious act, it muſt be the appropriate act, the perſonal act, the ſingle act of the teſtator: he may take the aſſiſtance of counſel; the law does not prevent it; but he muſt always be himſelf the arbiter of his intentions. It is for him alone to pronounce, to decide, to will: never can his will be ſupplied by the miniſtry of another; if the juriſt gives his advice to the teſtator, it is only as to the form and not as to the eſſence of the act; if he ſpeaks, it is only to lend to the thoughts of the teſtator the neceſſary ſuccour of legitimate expreſſions.

And what is the reaſon of the two differences between a contract and a teſtament? it is founded upon the moſt pure ſources of ſound juriſprudence. We ſhall only point at them in paſſing, that we may enter upon that which more nearly concerns the real ſtate of the cauſe.

It is eſſential to human ſociety that there ſhould be contracts; it is not neceſſary that there ſhould be teſtaments; there are many flouriſhing ſtates, which have long refuſed to their citizens the

(*a*) Minority could not, according to the law of *France*, be alleged as a matter of defence, and was only relievable by an action commenced within a limited time, for the reſciſſion of the contract.

(*b*) Theſe illuſtrations are not ſupported by the *Engliſh* law.

right

right of making a teſtament. Was there ever any which deprived them of the faculty of contracting all engagements?

The faculty of engaging is conformable to every kind of law, the law of nature introduces it, the law of nations augments it, the civil law perfects it.

The faculty of diſpoſing by teſtament is the nature of civil law, or at moſt of the law of nations; but it is contrary to the law of nature, by which death deprives a man of every right over his property.

In a contract, each of the contractors has an inſpector, or rather a cenſor, in the perſon with whom he contracts; and even if he ſhould be deceived, his heirs may frequently have redreſs againſt his engagement.

In a teſtament the teſtator himſelf is his own cenſor, his own judge, his only inſpector, his will is inviolable, he is the ſole arbiter of his diſpoſitions.

The entering into contracts is favourable, and almoſt always accords with the law; teſtaments are often odious, and every teſtator begins with thinking himſelf more wiſe than the law itſelf; in fact he ought to be ſo, when he has the right to abrogate it.

After this is it aſtoniſhing, if the laws have granted a liberty of entering into a contract at an earlier period than that of making a teſtament, if they have willed that contracts ſhall be more favoured, more common, more eaſy to make than teſtaments, if they are content with a moderate capacity for the one, whilſt they require a great one for the other; laſtly, if the contract can be ſupplied by a ſubſtitute, whilſt a teſtament never can.

Let us reſt then upon theſe two important maxims, which are the reſult and ſubſtance of the general obſervations we have made concerning inſanity.

The firſt, that every man who cannot diſcharge the moſt common duties of ſociety, even thoſe which the laſt degree of reaſonable men are accuſtomed to fulfil, ought to be judged ſtill more incapable of making a teſtament.

The ſecond, that this incapacity is more important, in deciding upon the validity of a teſtament, than merely in determining upon the force and nature of a contract.

But how is this incapacity to be proved? That is the ſecond general point that we have propoſed to examine.

All men are born in a ſtate of ſanity. That is the common diſpoſition of nature: reaſon is the lot of man; it is that which diſtinguiſhes him from other animals. A man without reaſon is little more than an organized body, who only retains the ſhade and figure of a man. His ſtate is a kind of prodigy, and monſter in nature.

Hence

might be proved without a proceſs of falſification againſt the act. And why? becauſe, in this point, the notary exceeds his power. He is indeed an inſtrumental witneſs, honoured, as it were, with all the confidence of the law, depoſitary of the public faith; but all theſe good qualities are only given him to render a faithful teſtimony of what is executed between the parties, and not of their capacity and ſanity. And if this principle prevails, even in regard to thoſe acts in which the notaries make an expreſs mention of the ſanity of the teſtator, how ſhall it be with reſpect to other acts where this expreſſion does not occur, and where it is abſolutely unknown? And what ſhall be ſaid in regard to contracts where the notaries never examine the capacity of the parties when they are not evidence in regard to teſtaments themſelves, where they examine, where they atteſt, where they certify it?

We do not mean to conclude from all theſe reflections, that an act is an immaterial argument to prove the ſanity of the perſon ſigning it; we think, on the contrary, that it forms a ſtrong and powerful preſumption in its favour—but of what nature? This is what remains for us to examine.

All the force of a preſumption conſiſts in drawing from a known fact a conſequence more or leſs probable, which conducts the mind to the knowledge of an unknown fact.

Let us apply this propoſition ſo as to render it ſtill more evident. It is to be examined, whether a perſon, who has ſigned an act, enjoyed a perfect freedom of mind?

What is the known fact?—his ſignature of the act. What is the unknown fact to which they would arrive by the conſequence deduced from the fact which is known?—the aſſurance of his ſanity. And how are theſe two facts connected together, except by an argument merely founded upon probability? That is to ſay, that it is ordinarily to be preſumed, that an act ariſes from the will of the perſon executing it, and that when the act is reaſonable, the will which conſented to it was the will of a reaſonable man.

But is this preſumption infallible? This, we conceive, will not be alleged. For if the probability, which ſerves as the foundation of it, can never be fallacious, it muſt follow, that no proof of inſanity can ever be offered againſt ſuch an act; that every man who has ſigned a judicious contract, has conſecrated, as it were, his underſtanding by ſuch act, ſo that it can never afterwards be called in queſtion.

But without being ſatisfied with this general reaſoning, although deciſive, is it not evident that it is very poſſible for a man to ſign an act without willing it—without being capable of willing it—

without

without even knowing it? Does not experience furniſh us with an infinity of certain and inconteſtable facts which deſtroy this probability, notwithſtanding the ſtrength of preſumption in its favour? In ſhort, when it is even ſuppoſed that a man knew he ſigned an act, and that he intended to ſign it, what conſequence can be drawn from it, except that at that moment he was not abſolutely inſenſible, that ſome ray of reaſon might have intervened, that he has done a ſenſible action? But is the doing one ſenſible action a ſufficient proof of ſanity? And ſhall that ſingle action deſtroy the proof of a contrary habit? This reaſoning can never be anſwered by the mere evidence of the act itſelf.

Nothing, then, can overturn this important principle of the diſtinction of two kinds of acts; the one perſonal in their very ſubſtance, the other only in their ſignature; the one, in which a man finds no counſel but in his own reaſon, no reſource but in himſelf, and which are conſequently a direct and immediate proof of the ſanity of his underſtanding; the other, in which an exterior counſel may frequently hold the place of underſtanding, or an exterior impreſſion aſſume the attributes of will, and which only form an indirect preſumption of capacity; a preſumption neither infallible, ſince it is contradicted by experience, nor invincible, ſince it is every day deſtroyed by the authority of your judgments.

Let us now proceed to the ſecond kind of proofs; that is, proofs by witneſſes; and let us endeavour to diſcover the general principles by which we may judge of their force and ſolidity.

We ſhall at firſt make one general reflection upon this kind of proof, which ſeems a natural conſequence of what we have already obſerved concerning proofs by writing.

If it is true, as nobody can doubt, that it is very rare to find written acts which conſtitute a direct and immediate proof of ſanity; if there is but a ſmall number of thoſe perſonal acts which bear the ſenſible and luminous image of the mind and will of the perſon who has executed them; if all other acts only form a mere preſumption, and a proof which is as imperfect as it is indirect, what remains but to conclude that ſanity or inſanity are not facts atteſted by facts in writing, and, conſequently, that they can only be naturally and ordinarily proved by the depoſition of witneſſes?

Not only is inſanity or ſanity a fact, but it is an habitual fact, a diſpoſition, a permanent affection of the mind; and as habits are only acquired by reiterated acts, they are hardly ever proved, except by a long ſucceſſion, a continuity, a multiplicity of actions, of which it is impoſſible to have any other proof than the teſtimony of thoſe who have been attentive obſervers of them.

Let us add, that this proof is often more ſtrong than that which

is derived from acts in writing, becauſe witneſſes can ſtate actions more conſiderable in their duration, more important in their nature, more deciſive in their circumſtances, than the mere ſignature of an act however judicious.

Let a witneſs, for inſtance, atteſt that he has ſeen a judge, his colleague, diſcharge with accuracy all the functions of magiſtracy, give his judgment, and make his report, with the greateſt poſſible wiſdom and maturity—would not ſuch a fact be much more conſiderable than twenty rapid momentary ſignatures, frequently conducted by the hand of another? And, not to go out of the preſent cauſe, is there any one of the written acts adduced to prove the ſanity of the *Abbé d'Orleans*, which *Madame de Nemours* would not give up to be allowed the ſingle proof of having celebrated maſs, which, nevertheleſs, could not be proved in all its circumſtances, except by the depoſition of witneſſes?

It was not then this ſtate of capacity or incapacity that *Cujas* intended to ſpeak of when he ſaid, that, in queſtions relative to the ſtate of perſons, written acts are more efficacious proofs than the depoſition of witneſſes. Upon what ſubject was *Cujas* treating in this paſſage? Of birth, filiation, legitimacy, liberty, all queſtions of ſtate, in which a proof by writing is preſcribed, and determined by the law itſelf, becauſe the diſcuſſion relates leſs to a matter of fact than to a preſumption of law.

But although the queſtion of inſanity is a real queſtion of ſtate, it is, nevertheleſs, very different from thoſe which commonly bear that name. It is a mere fact, of which the proof depends, like that of all other facts, upon the depoſition of witneſſes; the form of it is not preſcribed by the law: it would be abſurd to require the atteſtation of it by formal acts and authentic inſtruments. Folly is, as it were, an innocent offence, an irregularity exempt from puniſhment, a diſorder purely phyſical; and, as in caſe of real crimes which infringe the laws of morality, and trouble the order of civil ſociety, we ſeek no other proof than the teſtimony of other men; it ſeems, alſo, that in that derangement of mind which violates the rights of nature, and is degrading to reaſon, we cannot deſire any proof more natural and convincing than that which reſults from the unanimous ſuffrages of witneſſes, who are the earlieſt judges upon this kind of conteſts.

After this general reflection upon the neceſſity of proof by witneſſes, we may conſider it either with reſpect to its exterior and circumſtances, or its interior and ſubſtance.

We call the exterior of the proof every thing which regards the number, the quality, and the dignity of the witneſſes.

On the contrary, we call the interior of the proof the facts, the circum-

circumſtances, the judgments, which are included in the depoſitions of the witneſſes.

Let us begin with the exterior, and examine the principles, which relate to the quality and number of the witneſſes.

We do not ſtop here to take notice of the weight, which the dignity and probity of the witneſſes may give to their depoſitions, which is a point that cannot be diſputed, provided all the other circumſtances concur with the quality of the witneſs, and that his teſtimony is not a mere vague and general depoſition, but particular, circumſtancial, ſupported and approved by the facts which it includes.

The number of the witneſſes demands a little more examination, and furniſhes matter for two queſtions in this cauſe.

The firſt, which does not require a long diſcuſſion, conſiſts in ſettling, whether a ſuperiority in the number of witneſſes is ſufficient to form a conſiderable and almoſt deciſive advantage; a queſtion which ought only to be treated in one of thoſe tribunals, where they reckon up their doctors on the one ſide and on the other; where the induſtry of the party conſiſts in citing a great number of authorities, and that of the judges is limited to counting them; but which ought not even to have been propoſed in the moſt auguſt ſenate of the world, where the opinions of the doctors, and the ſuffrages of the witneſſes, are not counted but weighed. *Non enim*, ſays the law, *ad multitudinem reſpici oportet, ſed ad ſinceram teſtimoniorum fidem et teſtimonia quibus potius lux veritatis adſiſtit.* *L.* 21. § 3. *ff. de teſtibus.*

Beſides, if the witneſſes had confined themſelves to the general fact of ſanity or inſanity, if they had ſaid on the one ſide, *the Abbé d'Orleans appeared to us to have loſt his reaſon*, and on the other, *he appeared to us a man of underſtanding*; ſome advantage might be derived from the plurality of the witneſſes; but they have all entered into an explication of particular facts, and it is in the compariſon of thoſe facts, rather than in that of the number of witneſſes, that the examination of the proof ought to conſiſt.

The ſecond queſtion, much more important that the firſt, relates to the particular facts, and conſiſts in adjuſting whether thoſe facts which are only atteſted by a ſingle witneſs, may nevertheleſs enter into the number of circumſtances, which conſtitute the general proof of ſanity or inſanity.

Without entering into long diſſertations, let us attend to the diſtinction which is eſtabliſhed by the unanimous ſuffrage of all the expoſitors; their authorities are collected by *Maſcardus*, in his treatiſe *de Probationibus*; and this ſubject appears to have been

very fully inveſtigated by *Felinus*, one of the moſt illuſtrious commentators on the decretals.

The matter to be proved, is either a certain, ſingle, determinate fact, and then we muſt apply the common maxim, *unus teſtis nullus teſtis*, becauſe this being an eſſential fact, it is neceſſary that the depoſitions of two witneſſes ſhould concur in eſtabliſhing the truth of it.

Or on the contrary, the queſtion relates to a general fact, a habit, a multiplicity of actions, from which only one conſequence can be drawn, and then it would be both impoſſible to require two witneſſes upon each fact, and unjuſt to reject the depoſitions of ſingle witneſſes, reſpecting individual facts.

We ſay in the firſt place, that it would be often impoſſible to require from a party, that each fact ſhould be proved by two witneſſes. For inſanity or ſanity are conſpicuous in all places, and at all times, and yet the ſame perſons cannot always be preſent at this multitude of actions; but if it were abſolutely required, that they ſhould all have ſeen the ſame action, it muſt then be ſuppoſed that a perſon, whoſe ſtate ſhould become the ſubject of conteſt, would be always ſurrounded by a croud of witneſſes, faithful and aſſiduous ſpectators of his conduct, who might at ſome future time ſpeak to the ſame circumſtances of ſanity or inſanity.

But not only is this ſuppoſition abſurd and impoſſible, we add that it would be unjuſt to reject the depoſitions of ſingle witneſſes, upon individual facts.

The general fact is, the only one of which you have ordained the proof, and you know that in this cauſe, although *Madame de Nemours* contended that it was neceſſary to allege particular facts of inſanity, you paid no regard to this argument, but purely and ſimply confirmed the ſentence, which admitted the proof of the general fact of inſanity; the particular facts are infinite, how would it be poſſible to allege them all in an interlocutory proceeding? the witneſſes are left at liberty to chuſe them, and to propoſe them as ſo many proofs of the general fact; but this general fact is always the ſubject matter of the proof, and the principal object of judicial enquiry; it is ſufficient that all the witneſſes ſhould ſay, that the perſon, whoſe ſtate is conteſted, appeared to them to be ſane or inſane: it is not neceſſary that they ſhould all agree in the reaſons which they aſſign for their judgment: they are conformable and accordant as to the principal fact, they only differ in reſpect to particular circumſtances, they go to the ſame point, by different routes, and thoſe who are ſeparated in the means, are united

united in the end. It is the ſame, as if two experts concur in declaring an inſtrument to be falſe, but found their opinion upon different obſervations, when they are examined ſeparately; does there not reſult from their unanimous judgment, although founded upon different motives, a proof as ſtrong as any which can be given, depending upon the ſcience of experts? In the ſame manner, witneſſes give their teſtimony reſpecting the ſtate of a man; one witneſs brings forward one fact, another adduces another; they all equally pronounce a conformable judgment upon the ſtrength or weakneſs of his mind. Can it be pretended that the proof is not perfect, becauſe each circumſtance is not atteſted by two witneſſes? do we not know what takes place every day in queſtions of ſtate, eſpecially thoſe which regard filiation and legitimacy, that it is very rare to find two witneſſes, who bring forward preciſely the ſame fact? One eſtabliſhes one preſumption, another furniſhes another conjecture, and it is from the aſſemblage of all theſe preſumptions and conjectures, that the proof is formed: an infinity of atoms compoſe one body, and although each in particular ſeems to have no extenſion, they form altogether an extended ſubſtance; many rays of light, which ſeparately have not any ſenſible luſtre, produce when united a ſplendid radiance, ſo many particular facts form one general fact.

Let us finally add, that in theſe caſes, as we have been told on the part of *Madame de Nemours*, the witneſſes enter as it were into a participation of the functions of the judges, whoſe judgment they ſometimes anticipate; and as it is not neceſſary that the ſame facts ſhould determine all the judges, and although ſome of them are influenced by one fact, and others by another, it is ſtill ſaid that they are all of one opinion, when they all agree in favour either of ſanity or inſanity; ſo witneſſes ought to be regarded as unanimous, when, from different particular facts, they all draw the ſame concluſion as to the general fact.

The writers, and particularly *Maſcardus*, after having ſtated ſome of theſe reaſons, draw this inference—*Non tamen de neceſſitate requiritur quod ſint conteſtes ſed ſatis erit ut ſaltem ſingulares ſint, quia et tunc recte probabunt furorem.*

Let us, however, acknowledge that in criminal matters, our uſage has reſtrained this opinion within more narrow limits, and that when the queſtion turns upon the general fact of uſury or extortion, although regard is paid to witneſſes who depoſe to particular facts, it is required that there ſhall be a certain number, to form a proof from their united depoſitions, and that ten witneſſes together only avail as one. But beſides that this principle was never introduced into civil cauſes, it would be uſeleſs in this caſe, where

there are on the one ſide and on the other, not only 10 and 20 witneſſes, but 76 on the one ſide, and 85 on the other, and conſequently much more than would be ſufficient, to form a proof even of particular facts.

Let us now penetrate into the interior of the proof, and endeavour to include in three or four general principles, every thing which regards the nature of the facts, and their different favour, in the parallel which may be made of the oppoſite inqueſts.

The firſt principle, as we have already ſlightly mentioned, is, that there are two kinds of facts.

The firſt is a general fact of ſanity or inſanity, and this fact alone is not ſufficient; the witneſs muſt explain the reaſon of it, or rather of the opinion which he has formed of the ſtate of the teſtator. *Non creditur teſti niſi reddat rationem dicti ſui.* This is the common axiom of all the writers. In caſe of a viſible fact, where he might ſay, *I have ſeen it*, he is believed upon his oath; but in the examination of an inviſible quality, where he can only ſay, *I believe it*, he ought to aſſign a reaſon for his judgment, and as an expert cannot be attended to, if he merely ſays, *I deem ſuch a writing to be falſe*, without ſtating his reaſons, ſo a witneſs upon the fact of inſanity is not intitled to credit, if he does not ſubmit both his judgment and the reaſon of it, to the intelligence and ſuperior authority of the judge.

The ſecond principle which reſpects the particular facts, that ſhould appear in the depoſitions of witneſſes, is, that notwithſtanding the general preſumption, which is always in favour of ſanity, thoſe who allege inſanity have one great advantage over thoſe who aſſert the contrary.

The latter can in general only prove negative facts, for to conſtitute a poſitive fact of ſanity, it is neceſſary that it ſhould not only inconteſtibly ſhew, that the perſon who is the author of it, could not do it without being in poſſeſſion of his reaſon at the particular moment; it muſt be alſo ſhewn that he could not perform ſuch an action, without being in a ſtate of ſanity, both in the time preceding, and in that which follows it. Without that it may very well prove a rapid and tranſitory moment, but not a fixed and conſtant habit. On the other hand, moſt of the facts of inſanity are poſitive; a ſingle action may ſometimes ſuffice for a perfect proof of folly, becauſe there are ſome actions, which bear ſo marked a character, of illuſion, of derangement, of alienation of mind, that it is impoſſible for a man in his ſenſes to commit them. Such is the unfortunate condition of men, that they may in a ſingle moment give convincing proofs of their folly; whilſt a whole courſe of life is hardly ſufficient to eſtabliſh a firm, certain, and evident opinion

opinion of their ſanity. In a word, a perſon in a ſtate of inſanity may perform ſenſible actions. Then ſuch actions do not prove that a teſtator is not in that ſtate. A ſenſible perſon cannot commit a ſtriking and diſtinguiſhed act of folly. Then one ſuch action abſolutely excludes the preſumption of a ſound underſtanding.

Then if there is an oppoſition in the proofs, if a great number of witneſſes appear on the one ſide for ſanity, and on the other for inſanity; if the conflict becomes entirely doubtful, by what rule can it be diſcovered? This is the laſt maxim which remains to be examined.

Two rules, both of them certain, and which ſeem nevertheleſs to favour the two oppoſite parties, occaſion all the difficulty which ariſes in eſtabliſhing this maxim.

On the one ſide it is certain, that negative witneſſes ought never to be compared with poſitive. Two poſitive witneſſes, ſay all the writers, ought to outweigh a thouſand negative ones.

On the other ſide it is not leſs certain, that witneſſes who depoſe to ſanity, are much more favourable than thoſe who allege inſanity. Two witneſſes of ſanity, ſay the ſame writers, are preferable to a thouſand witneſſes of inſanity.

How are we to reconcile theſe two principles, which appear to be equally certain, and at the ſame time ſeem diſtinctly oppoſite?

We think, that without having recourſe to the ſubtilities of ſome interpreters; without examining whether inſanity is more a privation of ſanity, than ſanity is a privation of inſanity; or whether inſanity is only a negative ſtate, or on the contrary, a real and poſitive diſpoſition; without entering into theſe diſſertations, which are more adapted to the ſchools, than to the majeſty of this audience, it is ſufficient to attend to a ſingle diſtinction, which appears to us to be ſo manifeſtly founded on reaſon and natural equity, that the mere ſtatement of it will ſerve as its proof.

The witneſſes who have been examined on the one ſide or on the other, either confine themſelves to the general fact of inſanity or ſanity, or on the other hand, they have ſtated particular facts, which ought neceſſarily to ſerve as a proof of the general fact.

If their depoſitions are general, if they are ſatisfied with ſaying, that the teſtator appeared to them to be in a ſtate of ſanity, or that he appeared to be in a ſtate of imbecility; then the favour of ſanity ought to prevail, and that for two reaſons, the one that in caſe of doubt, the balance ought always to turn on the ſide of reaſon, as on the ſide of innocence. The other, that the two proofs are in this caſe equally imperfect, and becauſe neither the

one or the other of the parties has proved what he has alleged, we reſt upon the general and natural preſumption of ſanity.

But if the depoſitions are circumſtantial, if the witneſſes have entered into a detail of the proofs of their judgment, then it is no longer upon a principle of favour, upon the general fact, that the cauſe ought to be decided; but upon a compariſon of the particular facts, in which the one have the advantage of being poſitive, and the others, on the contrary, are for the moſt part only negative; and this diſtinction is clearly marked by the authors themſelves, who ſay, that two witneſſes of ſanity ought to outweigh a thouſand of inſanity. *Quod præcipue veram eſſet*, (theſe are the words of *Maſcardus*): *quando illi pauciores deponerent in ſpecie plures autem in genere.*

What is then the caſe, according to this author, in which the favour of ſanity ought to outweigh the number of witneſſes to the contrary? It is, when the witneſſes in favour of ſanity give a reaſon for their judgment, enter into a detail of facts; *deponunt in ſpecie*; and on the contrary, the witneſſes of inſanity only ſtate the general fact, *plures autem in genere.*

In caſe this conflict and contraction appear even in the particular facts, propoſed on the one ſide and on the other, all the maxims which have been urged on the part of *Madame de Nemours* ought to have their application. It is in this conjunct caſe, that all the prerogatives which ſhe alleges become ſo many deciſive arguments, and that in caſe of doubt, the favour of the heir by blood, of a defendant, of a perſon in poſſeſſion, of one whoſe pretenſions accord with written inſtruments, ought without difficulty to be preferred to a ſtranger, to a demander, to a party not in poſſeſſion, and to one who indirectly combats the inſtruments, by accuſing their author of inſanity.

We have perhaps dwelt too long upon theſe preliminary reflections. But we thought that our miniſtry abſolutely obliged us to inveſtigate them, both becauſe this part of the cauſe was the moſt neglected by the parties, and becauſe it is abſolutely neceſſary to agree at firſt upon certain rules and meaſures, by which we may decide upon the weight and importance of the oppoſite proofs.

Let us now enter into the detail of theſe proofs, in which little more will remain than to recapitulate the facts, and afterwards to apply the principles which we have hitherto endeavoured to eſtabliſh.

Let us begin by the proof founded upon the written acts; this is the firſt in the order of time, and it has the advantage of being appealed to by both the parties.

We might ſay at once with ſufficient probability, that this examination is become uſeleſs and ſuperfluous, after the former ſolemn judgment which you have pronounced upon this conteſt. We might repreſent to you, that all theſe acts do not form an invincible preſumption in favour of the ſanity of the *Abbé d'Orleans*, ſince, notwithſtanding all theſe acts, you have admitted and ordained a proof by witneſſes. It is true that they have adduced two or three new acts, but theſe are of ſlight importance, and contain only a mere ſignature, without any other indication, any evident mark of the will and reaſon of the perſon who ſigned them.

Shall we venture to go ſtill further, and without violating the profound reſpect which is due to the ſecrecy of your judgments, may we enter into the ſanctuary of juſtice, and endeavour to penetrate as far as we can into the motive of the ſentence which you have pronounced? Shall we be permitted to propoſe our feeble conjectures, and to ſay to you, with that diffidence and reſerve which ought to belong to us, that the moſt apparent reaſon of your judgment is the principle which we have ſtated, and in which we are confirmed by your judgment, "that written acts are no direct proof of ſanity, except when they are entirely perſonal, and appropriate to the party executing them, and that, otherwiſe they only form a preſumption, liable to be conteſted and even deſtroyed by a contrary proof"? Now you have deemed that all theſe acts have no character, which evidently ſhews them to be the work of the perſon executing them; that on the contrary, it might be preſumed that his family had more ſhare in them than himſelf, and that at leaſt the fact being doubtful, and depending upon the ſtate of the *Abbé d'Orleans*, nothing but a proof by witneſſes could enlighten this doubt, and remove this difficulty.

But although you have not conſidered the acts as forming a deciſive preſumption, you have not judged that they can form no preſumption at all, and you only intended to join to that preſumption, the aſſiſtance of a greater proof: thus we are obliged once more to diſcuſs theſe acts, in order to examine preciſely the extent of the preſumption reſulting from them.

They are diſtinguiſhed into three claſſes, with reference to the three different periods of making them.

The firſt precede the teſtament.

The ſecond accompany it.

The laſt follow it.

Let us begin by examining the firſt, that is to ſay, thoſe which were made before the return of the *Abbé d'Orleans* to *Paris*, and, which is the ſame thing, up to the time of his majority.

What

What do we find in this firſt period? Two *arrêts*, ſome acts of adminiſtration, ſuch as receipts and directions for the common expence of his family, and laſtly two letters, the one of *Madame de Longueville*, and the other of *Metayer*.

The *arrêts* do not require any explication. It is ſufficient to obſerve their date.

The firſt was pronounced on the 22d of *July*; it confirms what had been agreed upon by the relations, it admits the letters of emancipation, which the king granted to the *Abbé d'Orleans*, and the *Comte de St. Pol*.

It is uſeleſs to dwell upon examining the inferences deduced from this ſentence. It is not compriſed in the time to which the court has decided the proof to be confined; it can only be made uſe of to defeat ſome anterior facts, which have been mentioned by three or four witneſſes, on the part of the *Prince de Conty*. But without anticipating at preſent what we are to obſerve in the ſequel, concerning the proof by witneſſes, we only remark at preſent, that the ſingle conſequence which can be deduced from the ſentence of emancipation, is that the facts which previouſly occurred, were not regarded by the relations as indubitable ſigns of a formed inſanity, but as equivocal actions, which might receive a favourable interpretation, ſince they did not prevent them from conſenting to the emancipation.

The ſecond *arrêt* is of the 2d of *September*, 1670; it permits the *Abbé d'Orleans*, and the *Comte de St. Pol*, to relinquiſh certain eſtates, for the purpoſe of paying *Madame de Longueville*.

But, beſides that this *arrêt* is preciſely at the commencement, and within the ſix firſt days of the time to which you have confined the proof by witneſſes, who does not ſee that it was a mere formality, a matter of ſtyle, in which the *Abbé d'Orleans* could take very little part? And in fact he paid ſo little attention to the conſequences of this affair, that without waiting for the concluſion of it, he had ſet out on the 30th of *Auguſt*, upon the journey of the river *Loire*.

The acts of adminiſtration are very few in number, one or two receipts, and as many directions, which only require a very moderate capacity: we ſhall examine this kind of acts more particularly in the ſequel of the cauſe.

There are then, properly ſpeaking, only two pieces in this firſt period which are of any importance, the one is the letter of *Madame de Longueville* to the *Curé* of *Coulomiers*; the other the letter of *Metayer* to *St. Beuve*; but as the latter has a neceſſary connection with the donation, we ſhall include it in the explication of that act, and at preſent only ſpeak of the former.

You recollect, Sirs, the fact which is the ſubject of the letter of *Madame de Longueville*, and the very terms of it, which have been read to you ſeveral times, have acquainted you with its real ſpirit.

The *Abbé d'Orleans* celebrated in the pariſh of *St. Maur* the marriage of the daughter of his nurſe with a man of the dioceſe of *Meaux*. The *Curé* of *Coulomiers* had given him permiſſion for the purpoſe. The biſhop of *Meaux* had conſented on account of the man being his dioceſan. Therefore, as was very truly obſerved on the part of *Madame de Nemours*, nothing was wanting to the exterior ſolemnity of this marriage. But, notwithſtanding this, from motives which are unknown to us, *Madame de Longueville* was troubled, alarmed, and had ſcruples reſpecting this marriage. She wrote on the 13th of *Auguſt* to the *Curé* of *Coulomiers*, informing him of a converſation, which ſhe had had with the archbiſhop of *Paris*, whom *Madame de Nemours* repreſents as her adviſer; ſhe ſtates to him that the archbiſhop of *Paris* had aſſured her, that he had not given permiſſion to thoſe whom the *Abbé d'Orleans* had married; ſhe requeſts him to inveſtigate this affair with prudence and ſecrecy, ſo as to remedy and rectify it, if it ſhould be found neceſſary. She particularly intimates to him, that this fact ſhould teach him, that it was not proper too readily to grant permiſſions to marry out of his pariſh, adding, that it would not be proper to give any ſuch to her ſon.

Who can help believing, that this letter is a written proof of the inquietude, of the diſtruſt, of the continual fear, which *Madame de Longueville* entertained, reſpecting the eccleſiaſtical functions of the *Abbé d'Orleans*, and that, even before the time at which the proof of the *Prince de Conty* ought to commence? We ſee her doubting of the validity of this marriage, inſtigating the *Curé* to apply a ſuitable remedy, exhorting him not to grant ſimilar permiſſions in future, enjoining him never to grant any to her ſon. She ſuppoſes then that he was ſurpriſed in reſpect to the celebration of this marriage; ſhe did not think him in a proper ſtate to adminiſter this ſacrament, ſhe requires the *Curé* to inform himſelf of the truth of the fact; and as her tenderneſs and prudence were equal to her piety and zeal, ſhe recommended him to maintain a ſecrecy and ſilence upon the ſubject. Who can combine all theſe circumſtances, without forming a very diſadvantageous opinion of the ſtate of the *Abbé d'Orleans?* It is, however, this ſame letter which *Madame de Nemours* would appropriate, by a concluſion which ſhe draws from it in favour of a ſtate of ſanity.

And what is this concluſion? It is reduced to this negative argument. In this letter we obſerve *Madame de Longueville* entirely occupied

occupied with the care of preventing the *Abbé d'Orleans* from adminiſtering the ſacrament of marriage; but at the ſame time ſhe ſuffers him to ſay maſs. Then ſhe thought him capable of performing this latter miniſtry, although the former appeared to her to be above his age and capacity.

We ſhall examine preſently, what was the conduct, or the forbearance of *Madame de Longueville*, reſpecting the important circumſtance of the maſs; but in the mean time this letter does not contain any proof of it. What! becauſe *Madame de Longueville* does not approve of her ſon having celebrated a marriage, muſt you from that, (for that is the whole amount of the letter) from that alone, conclude that ſhe approved and authoriſed his celebration of the maſs? The argument only requires to be ſtated.

But, ſay they, the celebration of the marriage is itſelf a proof, in writing, of the ſanity of the *Abbé d'Orleans*.

We will not reply, that this fact took place on the 27th of *April*, conſequently anterior by four months to the period of the proof; we will go further, and aſk why *Madame de Longueville* teſtifies ſo much inquietude, if this act bears the character of wiſdom in its author? Why make thoſe ſecret enquiries, with which ſhe charges the *Curé* of *Coulomiers*? Why prohibit him from granting ſimilar permiſſions to the *Abbé d'Orleans*?

For, in fine, ſhe could only be diſturbed reſpecting this marriage, becauſe it was not celebrated in the legal and canonical forms, and in that caſe it does not prove the capacity of the miniſter, or, on the contrary, all theſe eſſential forms were properly obſerved, as is contended by *Madame de Nemours*, and then it is manifeſt, that the ſcruples of *Madame de Longueville* could have no other object than the ſtate of the *Abbé d'Orleans*. What then is the object of the defenders of *Madame de Nemours*, when they take ſo much pains to prove that nothing was wanting to the ſolemnity of this marriage, ſince the only conſequence that can be drawn from this obſervation, is that all the difficulties of *Madame de Longueville* referred to the perſon who celebrated it?

We do not think it neceſſary to ſay any thing more reſpecting this letter, or to ſhew that it ought to be regarded as a proof of the weakneſs of mind, that had begun to ſhew itſelf in the *Abbé d'Orleans*.

Let us now come to the more important acts, that is to ſay, thoſe which nearly accompany the laſt teſtament.

Let us examine all the circumſtances of them, the time, the place, the perſons paſſing them, their number, their nature, and laſtly, the preſumptions ariſing from them.

At what time are they executed? In the firſt moment of his majority, all included in the ſpace of ſeven weeks.

What

What preceded and what followed them? They are included between the two facts, which are equally ſtriking and eſſential in this cauſe. The firſt is the fact of *Gué de Loré*, and what is in truth the faithful and ſimple recital of this adventure, which makes ſo conſpicuous a figure in the pleadings of this cauſe?

The *Abbé d'Orleans* returns towards *Paris* two months before his majority. He takes a hired carriage at *Angers*. All his domeſtics accompany him. He arrives at *Gué de Loré*, that is at one day's journey from *Paris*. He there meets a valet of the *Comte de Saint Pol*, who gives him a letter, for we may add this parol proof to the proof by writing. At the reading of this letter, ſurpriſed and frightened, he ſends his almoner to *Paris*, with ſome of his people, to endeavour to appeaſe his family, and obtain his pardon. He ſets off inſtantly, he hires in a hurry three horſes at one place, three chairs at another, arrives at *Orleans* the ſame evening, and ſtays there thirty-nine ſucceſſive days in an obſcure inn. He only leaves it to return to *Tours*, where he had as little to do as at *Orleans*, and does not come back till he has compleated his majority; and on the day after his arrival, and even in the morning, he ſigns one of the moſt important acts, which is adduced as a proof of his reaſon.

What has been ſaid to excuſe, to cover, to give a colour to this extraordinary adventure? It is pretended, that in the former journies of the *Abbé*, there are inſtances of levity, and that at moſt, this event would prove his wiſe and reſpectful ſubmiſſion to the orders of his family.

But, had this return no other cauſe, than a natural inconſtancy, a change of inclination, a kind of libertinage of mind? Why then return as far as *Gué de Loré*, if he had no thoughts of coming back to *Paris*? Why approach within one day's journey? Why come in a public conveyance, in which the places were taken all the way to *Paris*? Why change this deſign all at once, at the ſight of a valet, at reading a letter from a brother, over whom nature had given him the rights and authority of an elder? Why trouble and diſtreſs himſelf, not daring to ſhew himſelf at *Paris*, why repoſe more confidence in his almoner's negociation than in his own? Why this ſudden departure, this courſe ſo little ſuitable to the dignity of his birth? Why, after this, continue at an inn in *Orleans* forty days, and not return till three days after his majority, exactly in time to ſign all the acts? Are this multitude, this maſs, this combination of ſo many ſingular circumſtances, ſufficiently explained by the mere example of the former journies, in which there is nothing at all reſembling the fact in queſtion?

If they reſt upon the laſt ſolution which they would offer, if they

they ſay that this return, or rather this precipitate flight, is an effect of the blind ſubmiſſion of the *Abbé d'Orleans* to the orders of his family; what do they prove by this anſwer, except the fact inſiſted on by the *Prince de Conty*, that the family of the *Abbé d'Orleans* exerciſed an abſolute controul over his actions; that the *Comte de Saint Pol*, who ought to have reſpected the prerogative of age and birth, governed him leſs as a brother than as a maſter; that all the illuſtrious relations who preſided over his conduct, did not chooſe that he ſhould appear at court, or in *Paris*, except at the time when his preſence might be abſolutely neceſſary?

And in fact, have they been able to ſuggeſt any other reaſon, than the condition to which the *Abbé d'Orleans* was reduced, that could lead his family to prevent his coming into *Paris?* And, if this reaſon is not only the moſt probable, but the only one that can be reaſonably imagined under all the circumſtances of this affair; what remains, but to conclude, that *Orleans*, and the other cities on the *River Loire*, were a kind of exile, to which it was judged convenient to baniſh the *Abbé d'Orleans* until age, rather than reaſon, enabled him to ſign all the acts which might be neceſſary for the advantage of his family?

Such is the firſt fact, which precedes the execution of the writings.

You may recollect the ſecond; it was one of thoſe which appeared the moſt important and deciſive, at the time of the interlocutory ſentence.

In the courſe of the journey that immediately followed the acts that we are about to ſtate, the care of the expence of the *Abbé d'Orleans* was committed to one of his valets, called *Peray*. He rendered an accompt of them every month to his maſter, and at the foot of each there is an allowance in the hand writing of the *Abbé d'Orleans*. At the end of four months, he ceaſed to have this employment, he wiſhed to have a general diſcharge, and in this diſcharge, which includes all the preceding accompts, the *Abbé* declares, that he gave it in the preſence, and by the advice and counſel of *Dalmont* his ecuyer.

What is the cauſe of this very extraordinary declaration, which alſo appears in two other pieces? It is a perſon of full age, a prieſt, the eldeſt branch of the houſe of *Longueville*, who is ſpeaking. What is the important act which he ſigns? the allowance of an accompt of expence for three or four months, which he had audited himſelf, every month in particular; and in an act of this quality, he marks the circumſtance of the preſence, advice and counſel of his ecuyer.

It

It is *Peray* who deſires this declaration for his diſcharge? but if that is the caſe, *Peray* and all his family judged him incapable of regulating his expences.

Was it the *Abbé d'Orleans* himſelf who thought the precaution neceſſary? But this ſecond ſuppoſition is ſtill more difficult to comprehend than the firſt. Shall we find another example of a perſon in his ſenſes, of full age, of a prieſt, who ſuppoſes himſelf to require the aſſiſtance and counſel of his ecuyer, for the allowance of an account, who thinks he ought to expreſs that circumſtance as eſſential and neceſſary in the diſcharge which he ſigns, who ſubmits himſelf voluntarily to the inſpection of ſuch an attendant, and who places himſelf under the yoke of a domeſtic curator?

It is true, that this important fact did not take place until four months afterward; but it muſt be obſerved, that it goes back almoſt to the time of the teſtament, for the month of *March* is compriſed in the general diſcharge, and the teſtament is of the 26th *February*, having an interval of only a few days; therefore, although the fact did not take place till ſome time afterwards, its conſequence and intention is applied to the time which immediately follows the teſtament.

Such then is the time in which all the acts were paſſed, all in the firſt moments of majority, all in leſs than two months, all between the adventure of *Gué de Loré*, and the fact reſpecting *Dalmont*.

But at what place were they paſſed? Was it in ſome remote corner, where the *Abbé d'Orleans* had no other counſel than himſelf, no other aſſiſtance than that of his own inclination? It was in the middle of *Paris*, and in the boſom of his family.

And who are the perſons with whom he engages in the moſt important of theſe acts? It is his family themſelves; if we except ſome contracts, from which we can draw no other inference than of his mere ſignature. It is not then the caſe of a man who contracts freely with all kinds of people, who enjoys the peaceable poſſeſſion of his eſtate, and who is tranſacting perſonally the moſt important affairs with ſtrangers, which forms at leaſt a ſtrong preſumption of the public opinion, that he is in a ſtate of ſanity.

He had not then one of thoſe characters of mind, which are firm, ſolid, exempt from all ſuſpicion of their conduct, in which madneſs is regarded as an unforeſeen accident, as an unexpected misfortune, as a thunderbolt which heaven darts upon the earth, to manifeſt the weakneſs and infirmity of human reaſon; on the contrary, it was the caſe of a man whoſe genius was below mediocrity,

mediocrity, of uncommon levity, of extraordinary inconſtancy, low inclinations, a ſordid avarice, an obſcure life, diſhonouring the great name of *Longueville*; his continual excurſions without connection, without utility, without deſign, were the true, the faithful picture of the agitation of his mind. His incapacity was ſo great, that if we believe *Madame de Nemours*, he was ignorant at the age of twenty, and at the time of the firſt teſtament, whether his ſucceſſion would belong to his relations or his friends.

Who then, once more, are the perſons who ſpeak in theſe acts?

On the one ſide, a family attentive to conceal its misfortune, and to make diſpoſitions ſuitable to its grandeur and dignity; on the other, a man ſuſpected of derangement of underſtanding, perhaps already fallen into a ſtate of inſanity, but certainly in the approach to it.

Let us follow the other circumſtances; let us examine the number and nature of theſe acts.

The number furniſhes reciprocal arguments to both the parties.

According to *Madame de Nemours*, their multitude irreſiſtibly ſhews, that the *Abbé d'Orleans* was in the peaceable poſſeſſion of his ſtate.

If we attend to the *Prince de Conty*, the number of thoſe acts in itſelf affords a violent preſumption of weakneſs of mind, in the perſon executing them. They do not permit him to return to *Paris*, until his age rendered him competent to make an engagement; hardly is he arrived, when they load him with the ſignature of acts. Is it not viſible, that they are in a hurry to take advantage of the remains of his docility; that they wiſh to anticipate that fury which was rapidly advancing, and the fatal moment in which it would be neceſſary to place him in a ſtate of confinement?

And what is the nature of all theſe acts? is there any one which, by its diſpoſitions, by the clauſes which it contains, by the reſervations which are made, bears an evident character of the ſanity of the *Abbé d'Orleans?*

In the firſt place, we muſt retrench the greater number of theſe acts, ſuch as the contracts for annuities, the ratification of an inconſiderable exchange made by *Madame de Longueville*, in the capacity of tutoreſs, the acquittance given to the *Marquis de Beuvron*, the warrants for penſions; in all theſe acts there is nothing perſonal, except the mere ſignature, and we have ſhewn you that that is not ſufficient to diſſipate the ſuſpicion of inſanity.

To what then are all theſe acts reduced?

We can only reckon five that are of importance, except the teſtament itſelf, which we ſhall examine ſeparately.

And what are theſe five eſſential acts?

The

The tranſaction of the 16th *January* with *Madame de Longueville*, the act of the 31ſt with the *Prince de Condé*, the univerſal donation of the 23d of *February*, in favour of the *Comte de Saint Pol*, and finally, the two procurations of the 26th *February*.

The tranſaction in itſelf, has nothing which is proper and particular to the *Abbé d'Orleans*, nothing which can be regarded as his work, and in a word, nothing perſonal: nay further, there is a kind of demonſtration that he did not know the detail of the clauſes of this act; and that he ſigned upon the faith of his counſel, and upon the credit of *Madame de Longueville*. You recollect the date of this act, it is of the 16th *January*, 1671; the *Abbé d'Orleans* arrived on the 15th, in the evening; the act is very long, it required a leaſt a day's reading, for a man ſo little verſed in buſineſs as the *Abbé d'Orleans*, and it occupied more than eight days meditation on the part of thoſe who prepared it. Yet, this long, important and difficult act was ſigned in the morning; it was impoſſible for the *Abbé d'Orleans* to have read it, underſtood it, and examined it in all its parts; and let it not be ſaid, that in the month of *September*, his relations had permitted him to enter into the tranſaction with his mother; things had changed their complexion ſince that time. As he was then a minor, his relations only permitted him to relinquiſh the eſtate upon a regular eſtimate; but after his majority, he fixes the eſtimation himſelf, he regulates the price of the lands, and all the clauſes which are the natural conſequences. This act is entirely different from that which was projected; and once more this act was examined, approved, and ſigned by him in the ſpace of a ſingle morning.

The ſecond act, that is to ſay, the tranſaction by which the *Prince de Condé* gave the eſtate of *Neſle* in payment, was not indeed ſigned until fifteen days after the *Abbé d'Orleans*'s return to *Paris*; but it is at the ſame time true, that theſe fifteen days were not employed in deliberating upon the conditions of the treaty, ſince theſe were all regulated before his arrival; the procuration, by virtue of which it was executed, is at the foot of the treaty, ſo that nothing could be added to it; now the procuration was ſigned on the 15th *January*, that is on the day of the *Abbé*'s arrival, and ſent afterwards to *Paris*, with the treaty completely prepared and ready to be ſigned. It was ſigned in this ſtate, and is it not evident, that independently of the conſent, of the will, of the examination of the *Abbé d'Orleans*, the act was reſolved upon and ſettled, and only waited for the mere formality of ſignature.

The two procurations do not raiſe any particular preſumption of ſanity, they are like all the reſt of the acts, which only ſpeak as it

were by their mere ſignature. It is even contended, that they form a proof of inſanity; it remains then only to examine the donation; and that it is the only act in which there are ſome clauſes capable of inducing a preſumption of ſanity.

Such, for inſtance, are the reſervation of an uſufruct of ſixty thouſand livres, which appears too great for a perſon in a ſtate of imbecility, the reſervation of a groſs ſum of 60,000 livres, the moiety of the *Hotel de Longueville*, and the furniture, the power of diſpoſing by teſtament of the revenues of two years, immediately ſucceeding the death of the *Abbé d'Orleans*.

But on the other ſide, they remark an univerſal ſpoliation, an abdication of all property, an affectation of inſerting clauſes, which did not concern the *Abbé d'Orleans*, and which had no other object than the intereſts of *Madame de Longueville*, and in this conflict, in which each party pretends to have the advantage, conjectures multiply, preſumptions increaſe on the one ſide and on the other, and the proof becomes doubtful and uncertain.

On the one ſide, *Madame de Nemours* contends, that all the acts, and principally the donation, are ſo many legitimate proofs of the liberty, the ſanity, the perfect reaſon of the *Abbé d'Orleans*, that all of them are judicious, reaſonable, uſeful, neceſſary, and proclaim the ſanity of their author. What could be more ſenſible, than to take advantage of the firſt moment of his majority, to extinguiſh the moſt favourable debt of his family, by giving the eſtates in payment to *Madame de Longueville?* Could he refuſe to receive the eſtate of *Neſle*, by which the *Prince de Condé* diſcharges the debt owing from him? Was it not proper to give up to the *Comte de Saint Pol*, all the rights and advantages attached to ſeniority, which he had himſelf ſolemnly renounced, by conſecrating himſelf to religious profeſſion; but at the ſame time, was it not right to reſerve a conſiderable uſufruct, a habitation ſuitable to his birth, a liberty confined within reaſonable limits of diſpoſing of certain ſums? In ſhort purpoſing to take long journies, and to go out of the kingdom, could he have made a more ſuitable diviſion of his confidence, than that which he did make between *Madame de Longueville* and *Perquier* in the two procurations, by giving to the one the nomination to offices and benefices, and to the other the adminiſtration of his revenues?

On the other ſide, the *Prince de Conty* tells you, that there are two general views, ariſing both from the contracts and the donation, the one of which ſhews, that the *Abbé d'Orleans* had the very ſmalleſt ſhare in all theſe acts; and the other diſcovers, that they are much leſs the titles of wiſdom than the proofs of inſanity; ſince all theſe acts have no other object than to ſtrip him of his

effects, to place him beyond the reach of injuring others and himſelf, and in ſhort to reduce him to a kind of ſecret and domeſtic interdiction, leſs ſtriking, but not leſs efficacious than one which might be more public and ſolemn.

It was not the advantage of the *Abbé d'Orleans*, which was the object of all theſe acts, but the intereſt of *Madame de Longueville*, and of the whole family of *Longueville*; and is it poſſible to have any doubt of this firſt reflection, when we ſee that in the moſt important of all theſe titles, they have inſerted an extraordinary clauſe, a clauſe contrary to the principles of law, which do not admit one perſon to ſtipulate and contract for the intereſts of another; a clauſe by which the *Comte de Saint Pol* was obliged not only to ratify the tranſaction which the *Abbé d'Orleans* had made with *Madame de Longueville* and the *Prince de Condé*; but alſo to diſcharge *Madame de Longueville* from the jewels with which ſhe was charged by the inventory, and from a general account of the tutelage? Is it poſſible, after this, to doubt of the real motive, of the ſingle principle of all thoſe acts, and can it be ſuppoſed, that they were the work of the *Abbé d'Orleans*, when his intereſt is the only one which is neglected?

In three days, the eldeſt branch of the *Houſe de Longueville*, ſcarcely of age, without any apparent reaſon, is ſtripped of all his property; the donation takes from him his preſent effects, the teſtament which they get him to make deprives him of the diſpoſition of his future. They leave him indeed a handſome uſufruct to give ſome colour to the act; but if they give it him with one hand they take it away from him with the other, ſince, by the procuration which they make him ſign at the ſame moment, they interdict him at leaſt in point of fact from the adminiſtration of his uſufruct. At laſt, to put the final ſeal to his interdiction, they give him an inſpector, a kind of domeſtic curator, whoſe preſence, advice, and counſel, he a ſhort time afterwards thinks neceſſary, for the allowance of a trifling accompt of expences.

Such, Sirs, is the ſubſtance of the two contrary preſumptions, which the ſame acts furniſh to the oppoſite parties. It is for you to decide upon their plauſibility, to judge of their weight, and to turn the balance, which is almoſt equally ſuſpended between the one conjecture and the other.

But for ourſelves, ſince our miniſtry obliges us to give an explicit opinion upon this conflict of preſumptions, two reflections preſent themſelves, the firſt of which is ſuperfluous, becauſe the ſecond appears to be quite ſufficient.

In the firſt place we ſhould obſerve, that we cannot contemplate all the circumſtances which attend theſe acts, without admitting

that there is in the preſumptions offered on the part of the *Prince de Conty* a degree of probability ſo ſenſible and ſo apparent, that the mind can hardly refuſe its aſſent to them.

And we add, in the ſecond place, that it is not neceſſary that theſe preſumptions ſhould outweigh thoſe of *Madame de Nemours*, it is ſufficient that they ſhould be equal, and in caſe of this perfect equilibrium, nothing but the proof by witneſſes can turn the balance and fix the uncertainty of conjectures.

To explain our opinion more particularly, the preſumption which the *Prince de Conty* derives from the acts themſelves, is more ſtrong than that of *Madame de Nemours*. It is true, that on the one ſide it is difficult to reconcile them, and particularly the donation, with the ſuppoſition of ſanity, and that on the contrary, it is eaſy to accommodate them all to the hypotheſis of inſanity.

But who can doubt of the firſt point, when he examines what is really done in the principal acts under conſideration?

We know that it is ſufficiently common in great and illuſtrious families, for the eldeſt member, who devotes himſelf to the ſervice of the altar, to transfer to the younger the great advantages ordained for him by nature; therefore we ſhould not be ſurpriſed to ſee the *Abbé d'Orleans* give to the *Comte de Saint Pol* the lordſhip of *Neufchatel*, renounce his government, and even make a conſiderable donation of his moſt diſtinguiſhed territories.

But this is not what paſſes in the donation that we are examining; it deprives the *Abbé d'Orleans* of all kinds of property, it is not only the ſplendid titles incompatible with the obſcurity of his own life; not only duchies and governments that he gives to the *Comte de Saint Pol*, but he throws every thing into his hands without reſerving any property, except a moderate ſum not ſufficient to diſcharge his teſtament. He reduces himſelf to the ſtate of thoſe whom the authority of juſtice only interdicts from the diſpoſition of their principal, leaving them the adminiſtration of their revenues; and upon what occaſion does he make this ſacrifice to the *Comte de Saint Pol?* Is it on account of an eſtabliſhment worthy of his birth and his great qualities? Are there any other apparent cauſes? Do the age, the infirmity, the temper of the *Abbé d'Orleans*, inſpire him with this entire and univerſal renunciation? There is nothing of the kind, no occaſion, no new conjuncture, no probable reaſon, except that having attained his majority, his age has placed him in the condition of rendering himſelf deſtitute, and of being the inſtrument, as he was already the ſubject, of his own interdiction.

The principle of diſcretion then did not require from the *Abbé d'Orleans* what he did upon this occaſion; on the contrary, if he had

had any underſtanding, it is difficult to ſuppoſe that at the age of twenty-five, he would have caſt away his patrimony by his firſt piece of liberality, and by one ſingle donation deprive himſelf of the opportunity of ever making any other.

The Roman juriſts carried this matter further than we do, and ſo far from regarding this donation as an act of reaſon, they would have conſidered it as a kind of proof of inſanity; and although our uſage has admitted of univerſal donations, it muſt be admitted that of all acts none is leſs adapted to conſtitute a proof of ſanity. But without dwelling longer on theſe general reflections, let us proceed to the ſecond point, and ſee if theſe acts, which are not a neceſſary proof of ſanity, are not, on the contrary, intimately connected with the contrary ſuppoſition.

To be convinced of this, we are perſuaded that it is ſufficient to take a ſingle and connected view of all the circumſtances which we have hitherto examined ſeparately.

Let us then repreſent to ourſelves a nobleman of the quality of *M. de Longueville*, of a frame of mind below mediocrity, of a continual volatility and inconſtancy, wandering from place to place at the ſuggeſtions of his inquietude, governed by his family, not even daring to return to *Paris*, becauſe he was forbidden by the *Comte de Saint Pol*, conſtrained to hide himſelf at an inn at *Orleans*, and to wait forty days for the permiſſion of returning into the boſom of his family, ready to ſign acts which it is evident he never had time to examine, capable a ſhort time afterwards of reſpecting the authority of an attendant, who naturally ought to tremble before him, perſuaded that he has need of his advice, of his counſel, of his preſence, to allow an account of four months current expences. Repreſent to yourſelf then a man of this quality, ſo little converſant with buſineſs, that, according to *Madame de Nemours*, he did not know whether his ſucceſſion would belong to his relations or his friends: contemplate under all theſe circumſtances, this man in the ſpace of three days ſtripped of his property, renouncing his preſent effects by the donation, his future by the teſtament, of which he does not even continue maſter, and of which he leaves the minute in the hands of *Parquier*, that is, of a man devoted to the *Comte de Saint Pol*, the univerſal legatee of the teſtament; in ſhort, depriving himſelf even of the adminiſtration of the uſufruct, which was reſerved to him; and all this for the purpoſe of making uſeleſs journies little ſuited to the dignity of a prieſt, ſtill leſs ſuited to the dignity of his family, and in a few months afterwards taken into confinement during the continuance of theſe journies. And what took place in his family when he was put into confinement? Was any

thing changed in the plan which was adopted for the government and adminiſtration of his affairs? On the contrary, it was reſolved, that until a ſolemn interdiction, they ſhould continue to act by virtue of the procurations; the ſtate of fury itſelf did not derange the meaſures of the family; and in fact, had they not placed the *Abbé d'Orleans* in a ſituation in which the moſt extravagant fury did not require any alteration, becauſe he was already impotent, diſarmed, incapable of hurting himſelf or others?

Let us ſuppoſe that the family of the *Abbé d'Orleans* had in fact the deſign which is imputed to them, and of which the acts excite very ſtrong ſuſpicions; let us ſuppoſe, that they intended to diveſt the *Abbé d'Orleans* of all his effects, and that, wiſhing to ſave themſelves the pain of a public interdiction, they ſought the means of accompliſhing a private and domeſtic interdiction, which, as we have already ſaid, had leſs notoriety, but not leſs effect than a ſolemn and authentic judgment; this deſign has nothing in it which is not at once lawful and probable, it would be even probable in a private family, and it approaches almoſt to certainty in a family ſo exalted as that of the *Abbé d'Orleans*.

But this deſign once ſuppoſed, what meaſures would they take to carry it into execution? Would it not be neceſſary firſt to make him ſign acts for terminating in a diſcreet, equitable, and reaſonable manner the greateſt affairs of the family? Would they not afterwards make him give to the *Comte de Saint Pol* a liberty which himſelf could only abuſe? and was it not a matter of prudence to impoſe upon the donatory the eſſential condition of executing all the acts which the ſtate of the *Abbé d'Orleans* might have rendered doubtful? Would they not, in ſtripping him of the property of every thing which he poſſeſſed, leave him an uſufruct proportionate not only to his preſent ſtate, but to the uncertain event of his recovery? And becauſe they could not intruſt him with the adminiſtration of this uſufruct, was is not natural to make him ſign procurations? In fine, becauſe it was not poſſible to prevent his regulating at leaſt the ordinary expence of his eſtabliſhment upon his journies, would they not place over his conduct a wiſe and faithful inſpector, who might prevent ſurprize from the inferior domeſtics, and aſſure the family of the regularity with which every thing would be conducted?

Such are all the precautions which it ſeems poſſible for human prudence to take, in executing a plan which contains nothing improbable in itſelf, and ſuch at the ſame time are thoſe which have been actually taken. What then is the conſequence to be deduced from this ſuppoſition?

If the family intended a ſecret interdiction of the *Abbé d'Orleans*, they

they would have taken all the meaſures which we have repreſented. Now they have in fact taken all theſe meaſures. Then it is more than probable, that they had ſuch intention. Let us judge once more of the will by the works, of the intention by the actions, of the deſign by the event. Every thing which they could do, if they had had ſuch an object in view, they have actually done. Then we may ſuppoſe that this view was the real principle and motive, which prevails in all the acts.

From the boſom of theſe preſumptions, in the midſt of theſe acts, iſſues the laſt teſtament; an act in which there are two things to be conſidered.

1. The general preſumptions of the wiſdom of the teſtament, and of the favourable ſituation of the heirs, have already been propoſed, and the court has decided that theſe grounds were not ſufficient to diſallow a proof of inſanity.

2d. A great number of particular circumſtances, which fortify the ſuſpicions of inſanity.

1. What was the motive of the teſtament? None was neceſſary. He had given every thing by the donation. It is even pretended that the donation had taken away the charge of ſubſtitution, no preſent benefit engaged him to make this diſpoſition. Why preſs him ſo much, except for the apprehenſion that he would even loſe the faculty of making his ſignature?

2. The depoſit of this teſtament, the univerſal legatee becomes the maſter of it.

3. The inexplicable circumſtance of the papers found with the teſtament. Theſe were either made after the teſtament or before. It is impoſſible and abſurd to ſuppoſe they were made after. The *Abbé d'Orleans* depoſited his teſtament as ſoon as it was made, and ſet off himſelf eight days afterwards. Could it be ſuppoſed that he intended to change all the legacies without exception? For in the projects they are all different from the teſtament. They muſt then have been made before.

But if that is the caſe, what is the date of them? Perhaps they were made long before. What is the deſign of them? To confirm the teſtament? If he made them before the ſecond, it was the firſt which he intended to confirm; then he never intended to change it; then there was a ſurpriſe.

What arguments are oppoſed to all theſe preſumptions, which ariſe againſt the teſtament, as well as the acts which accompany it? We have obſerved three principal ones.

The firſt, that a charge of this deſign, this pretended concert of the family of the *Abbé d'Orleans*, was injurious to the memory of the illuſtrious relations, who compoſed the moſt noble and

principal part of it. But this topic was more adapted to excite the eloquence of the orator, than to afford a principle for the decision of justice, and does not appear to us to be so clear in point of fact, as they would persuade you that it is.

If the acts which were passed by the *Abbé d'Orleans* were not all suitable to the state of his family, to the grandeur and dignity of his house, if they were not such as he would have signed himself, if he could have been apprized of his situation, supposing it to be such as is contended by the *Prince de Conty*, there might be some ground for the reasons which have been alleged, for saying that it was not probable that relations not less illustrious by their virtue than their birth, would have abused the credulity, the facility, the docility, of a person destitute of understanding, to make him sign all kinds of acts contrary to his real interests.

But what have they made him do (we are speaking upon the supposition of the *Prince de Conty*,) which he would not have done himself, if he had possessed an adequate knowledge? Acts which were innocent, acts which were necessary, acts which could hardly be deferred, acts, in short, in which the welfare and splendour of the family of *Longueville* were involved. If at such conjuncture, in which it is more easy to blame what has been done, than to find out what it is best to do; if under the apprehensions of an approaching state of fury; if to prevent the consequences of an interdiction, and of a long state of controul; if to prevent the *Comte de St. Pol* from falling into the twofold misfortune of being the brother of a madman, and of being only his younger brother in relation to the property; in short, if to give a certain form to all the affairs of a great family, they made use of the remains of docility, which were found in a weak and deranged understanding; if they did in respect to him what is done every day in the case of minors, and what the *Roman* law permits to be done with respect to those who are under the age of puberty; that is to say, the getting them to sign acts, which they neither could nor would intend to sign of themselves: under all these circumstances, is it necessary to revile an illustrious family, which wanted neither understanding nor discretion, which did what they could, rather than what they wished? Should we not, on the contrary, commiserate them, excuse them, and wish that it may never happen to ourselves, to be reduced to a similar conjuncture, where good counsels are rare, where censure is easy, where the evil is evident, and where the remedy is doubtful and uncertain?

The second general argument, by which they would combat the presumption, which the *Prince de Conty* derives from the acts themselves, is more considerable. You have been told that the acts re-

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pel the ſuſpicion, and that they contain clauſes which can only agree with the ſuppoſition of ſanity.

It muſt, in the firſt place, be admitted that ſuch clauſes only occur in the donation. The other acts contain nothing, which is either neceſſarily or probably a proof of ſanity, in the perſon ſigning them.

But what are theſe clauſes in the donation, which ſo manifeſtly repel even the ſlighteſt ſuſpicions of ſuch a concert in the family?

The uſufruct, you are told, is too conſiderable; why leave 60,000 livres a-year, to a perſon out of his ſenſes, and who did not before commonly ſpend more than thirty? Why give him beſides a groſs ſum of 60,000 livres? Why reſerve to him the moiety of the *Hotel de Longueville*, with furniture of the value of 100,000 livres?

In ſhort, why reſerve the liberty of making a teſtament? Why ſtipulate a return in favour of *Madame de Nemours?*

One general principle is an anſwer to all theſe objections. It is ſufficient for rendering all theſe reſervations probable, to ſuppoſe in general, that the family had foreſeen a caſe which might arrive, that is, the recovery of the *Abbé d'Orleans*. It would not be juſt in ſuch a caſe, that he ſhould be reduced to an uſufruct, which might be ſufficient for a perſon in a ſtate of inſanity, or that he ſhould have nothing to diſpoſe of either for the purpoſe of recompenſing his domeſtics, or for other juſt and ſuitable cauſes.

Could they beſides, at leaſt without publicly declaring him to be out of his ſenſes, reſerve to him a leſs conſiderable revenue? Could they exclude him from the *Hotel de Longueville*, or take away from him the furniture, which was neceſſary for occupying it? Would not this have been falling into the inconvenience which they wiſhed to avoid, the recognizing his inſanity, and furniſhing a written proof of it?

The faculty of making a teſtament which was reſerved to him, did not continue long. They make him conſummate it in three days afterwards, by a teſtament of which *Porquier* was the depoſitory; and if a right of return is ſtipulated in favour of *Madame de Nemours*, is that ſtipulation ſo much perſonal to the *Abbé d'Orleans*, as it is ſuited to the ſtate of his family?

Finally, are we called upon at preſent to penetrate into all the ſecret reaſon of theſe acts? Beſides theſe apparent reaſons, might not the family have an infinity of others, if they could be heard upon the ſubject? Perhaps they might ſay, that ſo conſiderable an uſufruct was deſtined for the accumulation of a fund, which

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upon ſome occaſion might be a reſource to the *Comte de St. Pol*, without his having the power in the mean time of diſſipating it. Is it neceſſary preciſely to define the motive, which made them add ſuch and ſuch a clauſe, and is it not ſufficient to ſhew in general that there are no clauſes, which neceſſarily exclude the ſuppoſition of inſanity, and which inconteſtibly eſtabliſh the contrary preſumption?

But, ſay they, the donation is an inviolable title, whether we examine what preceded it, or contemplate what followed it.

That which preceded it, is the letter which *Metayer* wrote to *St. Beuve*, by order of the *Abbé d'Orleans*, a letter which he approved by ſome words in his own hand, and which proves, ſay they, demonſtratively, that the donation is the act of his will.

What follows, is the approbation of the family, the confirmation of the king, the preciſe authority of your ſentence.

Let us endeavour in two words to anſwer theſe laſt objections, and begin with the letter of *Metayer*.

What are the circumſtances of it?

1. Why did not the *Abbé d'Orleans* write it himſelf? No affair could be of greater importance to him. He was not one of thoſe who are afraid of the trouble of writing themſelves. We ſee him writing upon affairs of no conſequence, entering into the moſt inſignificant details, record that he had taken care of furniſhing the chamber of his *Ecuyer*, and a thouſand other things of the like kind, which ſhew that he wiſhed every thing to paſs through his own hands; and that he did not even neglect thoſe cares, to which it was entirely beneath his dignity to attend.

Yet we ſee him here, upon the moſt important occaſion of his life, borrow the hand of his almoner. This is the firſt circumſtance.

2. What are the great affairs which prevented his writing himſelf? You have already ſeen in the depoſition of the witneſſes. He was 30 days without any occupation at *Orleans*; at the utmoſt, according to *Madame de Nemours*, one hour of his time was deſtined to the celebration of the maſs, and if we believe the witneſſes of the *Prince de Conty*, he was occupied in running about the ſtreets of *Orleans*, in jumping upon his ſhadow, in dancing upon the ramparts. Such are the important cauſes, which prevented his writing himſelf reſpecting an act, which was to diveſt him of all his property.

3. What does he call this act, or rather, what is it called by his almoner? A treaty which he was about to make with the *Comte de St. Pol*. It is true that the donation is ſubject to ſeveral conditions, but the name of a treaty is not very ſuitable to an act of this

this nature. Is it even proved that the project of this act was ever ſent to the *Abbé d'Orleans*, as they have ventured to aſſert? The letter does not ſay ſo; on the contrary, it ſtates that *Porquier* had orders to communicate this treaty to *Saint Beuve*, and if the *Abbé d'Orleans* had ſeen it, ſo important a circumſtance would not have been omitted in the letter.

4. How was this letter to be delivered? It is not confided to the ordinary courſe by couriers. *Dalmont* is to be the bearer of it, *Dalmont* who did not return to the *Abbé d'Orleans* until the month of *December*. *Dalmont* who, as has been proved by the witneſſes, and as appears by other circumſtances, was in poſſeſſion of the ſecret of the family. *Dalmont*, in ſhort, who ſets off as ſoon as the letter was written. It is dated on the 28th, and he goes on the 29th.

5. In what manner does the *Abbé d'Orleans* approve of this letter? Let us repeat the terms of his addition? "Be diligent that I may be able to ſay to you with joy—*In viam pacis*.—I am wholly yours.—Your ſervant.—Every thing which *Metayer* has told you of my intentions is true.—Adieu, without adieu."

We do not think that theſe terms clearly manifeſt a great derangement of underſtanding, as has been inſinuated; but they prove that upon the diligence of *Saint Beuve*, and thoſe who were employed in preparing the act, depended the return of the *Abbé d'Orleans*. *Be diligent that I may ſay to you with joy*, &c. and does not this irreſiſtibly prove, that he was not yet at liberty to return to *Paris*, that the orders of the family prevented his entrance, until the acts were prepared and ready to be ſigned?

Let us add to all theſe reflections, that there was an interval of two months between this letter and the donation, and that even if it were proved that the *Abbé d'Orleans* was in a ſtate of ſanity then, it would not follow that he was ſo two months afterwards; and under all theſe circumſtances, let us admit that this letter is ſtill a doubtful title, and an equivocal argument which each of the parties by turns apply in their own favour, and which ſerves much leſs to prove the will of the *Abbé d'Orleans*, than to ſhew the authority of his family.

But is that which followed leſs conſiderable, than that which preceded the donation? You remember what was called a confirmation.

The relations of the *Abbé d'Orleans*, being aſſembled to deliberate upon the mode of adminiſtering his affairs, have always ſpoken of the donation as an inviolable title, which ought to be carried into execution. But had the relations any authority to impeach it? Could this act, inveſted as it was with a ſolemn and authentic

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form, be annihilated by their changing their minds? Suppoſing even that they had the power, would they have had the inclination to deſtroy their own work? and if the ſuppoſition of the *Prince de Conty* is true, would they not on the contrary aſſure, by the continuation of their ſuffrages, the execution of an act which from them derived its birth, as it was afterwards indebted to them for its preſervation? Beſides was this queſtion ever agitated, was this doubt ever ſtarted in any aſſembly of the relations? Had any of them an intereſt to conteſt, to combat, to deſtroy this donation? And how can the acts of the family of the donor be conſidered as a confirmation of the donation, ſince every thing which was neceſſary to raiſe the ſlighteſt queſtion was equally wanting, that is to ſay, the power, the inclination, the intereſt, and the capacity?

This is not the only kind of confirmation, which *Madame de Nemours* alleges in favour of this title. The king, it is ſaid, has authorized it by his letters patent, and yourſelves, the depoſitaries of his ſovereign juſtice, have added the laſt ſeal to its validity. But what are all theſe confirmations? This is a matter which it will not be very difficult to explain. The king has confirmed the donation, by receiving the fealty and homage of the donatory, and of *Madame de Longueville* in quality of curatrix after the donation; in remitting to the one and the other the reliefs which were due, in ordaining the execution of ſome recommendations of the relations founded upon the ſame title. The court has confirmed it in the ſame manner, by granting to the lord of a ſeignory, the fœdal profits ariſing upon a change of property by the donation. In truth, Sirs, it is ſurpriſing that in a cauſe ſo extenſive, ſo difficult, ſo full of real queſtions, they ſhould mingle ſuch facts as theſe, facts which had been already urged upon the interlocutory proceeding without ſucceſs, and which now appear to us to be ſtill more inefficacious. For to draw any concluſion from them, how many falſe facts muſt be ſuppoſed? 1. That he who confirms an act, without having any cognizance over it, gives it a new degree of force and authority, contrary to the common opinion of juriſts and canoniſts; and particularly of *Charles Dumoulin*, who explains in ſo learned a manner, in his treatiſe on the *Cuſtom of Paris*, the rule of law, *Qui confirmat nihil dat.* 2. It muſt alſo be maintained, that when the king receives fealty and homage of a new vaſſal, he intends without any examination, without any preceding conteſt, without any judgment, thereby to confirm the title by virtue of which the new vaſſal has taken the fief, and that he who prepares the record of having rendered fealty and homage, or at moſt he who ſigns it, thereby prejudges all the queſtions, which

which may be afterwards formed concerning the vaſſal's right of property. Laſtly, they muſt go further, and ſuppoſe that when you oblige a new poſſeſſor to pay the dues which belong to the lord of the fee, although the queſtion cannot be agitated by this lord, yet you decide from thenceforth upon the goodneſs, the force, the execution of the contract, and that thoſe who have an intereſt, can never impeach the transfer, upon this ſingle ground, that the party acquiring the eſtate has been obliged to render the fœdal rights and ſervices.

If all theſe ſuppoſitions are equally abſurd, the queſtion of the donation is then entire; the letter of *Metayer* which precedes it; the different acts which follow it, cannot deſtroy the inference derived from it, nor the ſeveral preſumptions which ariſe from this ſpoliation, of this abdication, of which it is the ſtrongeſt proof of any in the cauſe.

But after having ſhewn you, that theſe preſumptions are not injurious to the illuſtrious family of the *Abbé d'Orleans*, after having ſhewn you that they are not effaced by the clauſes of the acts, nor by all the circumſtances which precede and follow them, it remains to anſwer a laſt objection deduced from the conſequences of the *Prince de Conty*'s demand; or rather, we may abſolutely diſpenſe with anſwering it, becauſe this objection rather applies to the intereſts of the parties than to the deciſions of juſtice. It is pretended, that if the teſtament was to be overturned, its fall would bear along with it that of all the contracts, and that what the *Prince de Conty* would loſe on the one ſide, would be much more conſiderable than what he would gain on the other. But it was for the *Prince de Conty*, that is, it was for his counſel to foreſee, to examine, to prevent if poſſible the conſequences of his demand. We contemplate them, but are content with contemplating them, without enquiring particularly what would be the points relied upon by *Madame de Nemours*, in the caſe which ſhe ſuppoſes, or what would be the *Prince de Conty*'s ground of defence. We ſuſpend our judgment in that reſpect; happy if we could ſuſpend it as to all the reſt; and without chooſing to decide at preſent, whether the fate of the contracts ought to be the ſame with that of the teſtament, we will content ourſelves with ſaying, that the parties implore from this auguſt tribunal not the counſels of its prudence, but the oracles of its juſtice.

Let us here pauſe a moment, ſlightly to recapitulate what we have already ſaid, reſpecting the principal acts of the cauſe, that is to ſay, the acts of diſpoſition. You have ſeen that all theſe acts have nothing perſonal, or which bears the character of the will and capacity of the *Abbé d'Orleans*. You have remarked all the circumſtances which accompany them, the time, the place, the perſons,

perſons, the number of the acts, their nature; all ſeem to concur to eſtabliſh the preſumption of that judicious controul, of that neceſſary concert of the family of the *Abbé d'Orleans*, to pronounce againſt him, a kind, or favourable, or friendly interdiction. Laſtly, we conceive that we have ſhown that the objections of *Madame de Nemours* do not remove this appearance, which ſo properly and naturally belongs to all the circumſtances of the cauſe.

We go however ſtill further, and are of opinion that it is not even neceſſary, that this preſumption ſhould appear to be more ſtrong than that of *Madame de Nemours*. It is ſufficient if the deductions of the reſpective parties are balanced, that they are equal on the one ſide and on the other, in order to be convinced that it is not by the acts that the cauſe ſhould be decided. Theſe acts may be doubtful, uncertain, equivocal, giving equal weight to each of the oppoſite preſumptions. Upon the view of thoſe acts, the balance of juſtice remains ſuſpended, until the proof by witneſſes inclines it to the one ſide or the other.

But before we paſs to this ſecond proof, we muſt ſhortly ſtate the acts of the laſt period, that is, thoſe which have paſſed ſubſequent to the teſtament.

We obſerve in them the ſame diſtinction which has been taken notice of, in reſpect to the acts of the time of the ſecond teſtament.

There are acts of diſpoſition and thoſe of mere adminiſtration. The acts of diſpoſition are all of the ſame nature; the nomination to a benefice which is only announced in the act of induction, a remiſſion of ſeignoral rights in favour of *M. de Montefault* before the notaries of *Marſeilles*, the gift of the ſucceſſion of a baſtard made to *Deſgoureaux* at *Straſburgh*. But are there in theſe three acts the character of perſonality which we look for? Do we diſcover in them any act which proves the reaſon of the *Abbé d'Orleans*, except his mere ſignature; and is it not ſufficient for reconciling that to the fact of inſanity, merely to ſuppoſe that the family ſtill deferred his interdiction, and that until that deciſive moment, it was requiſite that the acts of alienation ſhould be ſigned by him? The firſt of theſe is more than probable, the ſecond is a neceſſary conſequence of it.

The acts of adminiſtration are reduced to bills of exchange, to allowances of accounts, to letters.

It is true that they have adduced directions, and bills of exchange, ſome written, others ſigned by him, which do not induce any ſuſpicion of inſanity, but there is one ſo extraordinary in its form, that it entirely outweighs the authority of all the others. You remember the obſervations which were made upon this bill

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of exchange. It is written on the whole length of a ſheet of paper, and the *Abbé d'Orleans* adds at the foot, *Bien que d'autre main ſoit, je promets de n'en tenir compte.* There muſt be ſome fault in the words, but without ſtopping to examine the conſequence of that, let us attend to a more material obſervation. The *Abbé d'Orleans* thought then that the bill was void if it was not in his hand writing, ſince he cauſed theſe words to be added, which contain an expreſs approbation. It was neceſſary then to write this approbation with his own hand, for if the bill appeared informal becauſe written by another perſon, how could he intend to repair that defect by an approbation entirely written by the hand of another? He ſhould at leaſt ſign this approbation which appeared ſo eſſential, and yet he did not do ſo. He is content with ſigning the bill, and how does he ſign it? It is to be obſerved, that this approbation written at the foot of the bill, only takes up about half the ſize of the paper, and his ſignature is at the ſide of this approbation and not below it, and it is made in a circle in order to reach the writing of the bill.

This piece which as you ſee is more than ſuſpicious, is of the 5th *April*, 1671, that is to ſay five weeks after the teſtament, it is uſeleſs to draw any further inferences from it. Its quality, its ſtate, its appearance ſpeak ſufficiently for themſelves. It is contended on the part of *Madame de Nemours*, that the *Abbé d'Orleans* intended that the ſame ſignature ſhould ſerve both for the bill of exchange and for the approbation at the foot of it, and therefore he had placed it below the firſt and at the ſide of the laſt; but ſhall this abſurd deſign, ſtill more abſurdly executed, be regarded as a proof of underſtanding; and beſides, what man in his ſenſes, intending to approve an act not in his own hand writing, and thinking ſuch an approbation neceſſary to render it valid, would not write the approbation with his own hand? This has not been anſwered, and in fact it appears difficult to anſwer it.

The allowances of accounts might appear a more conſiderable proof of the capacity of the *Abbé d'Orleans*, but the inference deduced from them is ſtrongly oppoſed by the important fact which we have taken notice of, by that domeſtic inſpection of *Dalmont*, of which we have already ſpoken, an inſpection the neceſſity of which was recognized by the *Abbé d'Orleans*, an inſpection to which he himſelf ſubmitted. The proof of this appears in writing in three different places, and particularly in that important charge which he gave to *Peray* his valet de chambre, in the preſence and by the advice and counſel of *Dalmont*, and as in this diſcharge are compriſed all the accounts from the beginning of *March* to the 16th of *July*, it is clear that the inference goes back

back to the time of the teſtament, and forms a very ſtrong preſumption of what we have already obſerved to you, that after having ſtripped the *Abbé d'Orleans* of the ſubſtance of his property by the donation and teſtament, after having deprived him even of the adminiſtration of what was left by the procurations, they did not leave him maſter of his expences. He had an inſpector, whom we called at the time of the interlocutory diſcuſſion, and now call with ſtill more reaſon, a domeſtic curator.

It remains only to examine the letters. Three or four are adduced in which we obſerve ſeveral obſcurities, uſeleſs repetitions, a great lowneſs of mind, without however any particular indication of folly. But, beſides that three or four letters can never be a ſufficient proof of a man's ſtate, beſides that theſe letters have not prevented your allowing a proof by witneſſes; there is a further reaſon which inconteſtably proves that the preſumption drawn from the letters is neither convincing nor infallible. At the time of the interlocutory examination a letter was produced written by the *Abbé d'Orleans* after he was placed in confinement, and this does not contain any greater marks of derangement than the others. What concluſion then can be drawn from the letters, ſince even at the very time of his fury, and in the confinement of his priſon, he could write a letter not more extravagant than thoſe adduced by *Madame de Nemours* as demonſtrative of his inſanity?

Such, Sirs, are all the written acts, all the preſumptions that are drawn from them, all the proofs reſulting from them. In the period preceding the teſtament, you have ſeen the letter of *Madame de Longueville*, and that of *Metayer*; the firſt ſhews the clouds that were beginning to ſpread over the ſtate of the *Abbé d'Orleans*, the ſecond is a very equivocal and doubtful ſign of his alleged capacity. At the period of the teſtament, you have ſeen the conflict of preſumptions which the principal acts have excited between the parties, and in this conflict we have endeavoured to eſtabliſh three preſumptions which appeared to us equally certain; the one, that the conjectures of the *Prince de Conty* are much more ſpecious, more probable, more conformable to the whole ſet of acts than thoſe of *Madame de Nemours*; the other, that ſuppoſing the preſumptions to be equal on the one ſide, and on the other, the cauſe ought to be decided by the witneſſes. Finally, in the laſt period, we have obſerved that excepting ſome acts in which there is nothing perſonal, except the mere ſignature of the *Abbé d'Orleans*, the reſt are either indifferent, or capable of forming ſtrong preſumptions, and commencements of proof by writing both by the figure and tenor

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of the acts; and by the conſpicuous proofs which the *Abbé d'Orleans* has given againſt himſelf, of the ſtate of ſervitude to which the neceſſary inſpection of a domeſtic curator had reduced him. The diſcuſſion of the acts then leads us to the neceſſity of paſſing to an examination of the proof by the witneſſes.

FOURTH AUDIENCE.

We are at length arrived at that moment which is more difficult and important to ourſelves than even to the parties; in which we are obliged to determine between the different ideas that have been given of the ſtate of the *Abbé d'Orleans*; and to preſent you with a faithful picture of it, in which you may diſcover either the features of reaſon, or the characters of madneſs. We avow, in beginning this laſt part of the cauſe, and we avow it with ſome degree of confuſion, that after three audiences, we bring it before you preciſely in the ſame ſtate, in which it has been from the time of your former ſentence; and if we have ſtated the circumſtances of fact, re-eſtabliſhed the principles of law, weighed the oppoſite reaſonings upon the written inſtruments, balanced the reſpective preſumptions; we had ſatisfied the duties of our miniſtry upon all theſe objects, at the time of the interlocutory ſentence; but we could not excuſe ourſelves from again recurring to them, in order to recal our former ideas, and ſhew the point in conteſt. Every thing this day concurs to render it neceſſary to enter into a diſcuſſion of the proof by witneſſes, and to this examination we are now excluſively to attend.

We obſerved, in eſtabliſhing the general principles upon the the ſubject, that all teſtimonial proof ought to be contemplated in two different manners, by its exterior ſurface, that is to ſay, by the number and quality of the witneſſes, and by its interior ſubſtance, that is, by the multitude and importance of the facts.

Let us now apply theſe general rules to the particular circumſtances in this cauſe; let us examine, firſt, the exterior of the proof, and make a ſhort parallel of the number and dignity of the witneſſes, in the one inqueſt and in the other.

We ſhall not dwell upon the obſervation, that in one there are 85 witneſſes, and in the other 76. This difference is not ſufficiently conſiderable, to influence the deciſion of the cauſe; and beſides, if we deduct from the 85 witneſſes of *Madame de Nemours*, thoſe who are abſolutely negative, who merely ſay that the *Abbé*

d'Orleans did not appear to them to be in a ſtate of inſanity, or that he appeared to them to be a perſon of good ſenſe, if we take away a part of 25 witneſſes, who were examined at *St. Marie aux Mines*, and who, only depoſing to the ſame facts, are, according to the ordonnance, to be reduced to the number of ten: If we make theſe juſt and neceſſary retrenchments, the witneſſes of *Madame de Nemours* will be fewer than thoſe of the *Prince de Conty*. But to return to our principles, the number of witneſſes cannot be very material, except in the proof of a ſingle public and general fact; but when the general fact abſolutely depends upon particular facts, the number of witneſſes becomes uſeleſs, and the particular facts are alone deciſive.

Neither ſhould we enlarge upon the quality and dignity of the witneſſes. If we except on each ſide certain important witneſſes, of whom we ſhall preſently make a compariſon, the advantages of the parties are in this reſpect nearly equal; we find in each of the inqueſts, prieſts, members of religious ſocieties, gentlemen, tradeſmen, artiſans, and perſons of the loweſt condition; there is ſo little difference in this reſpect between the inqueſts, that it does not require any longer conſideration.

If we make a compariſon between the more important witneſſes, that is, ſuch as were in the family of the *Abbé d'Orleans*, of *Madame de Longueville*, or of the *Comte de St. Pol*, and had an opportunity of being the moſt exact obſervers of a perſon they ought to conſider as their maſter; you will doubtleſs be ſurpriſed at the confidence with which it has been ſo often aſſerted, on the part of *Madame de Nemours*, that the witneſſes of the *Princes de Conty* ought not even to be placed in compariſon with hers.

Let us begin by retrenching from this number *M. le Nain*, whoſe teſtimony alone would be worthy to decide this celebrated difference, if it was as conſiderable by the facts which it contains, as it is illuſtrious by the name and virtue of its author. But if we except this ſingle witneſs, to what are all the other domeſtic witneſſes in the inqueſt of *Madame de Nemours* reduced? There are only two, whoſe quality can give any particular weight to their depoſitions; the one is *David*, *ſecretary des commandements* of the *Duke de Longueville*, the other is *Peray*, *valet de chambre* to the *Abbé d'Orleans*, but of theſe two, *Peray* is juſtly excepted to, *David* then is the only conſiderable officer who remains; for we do not ſuppoſe that they can ſeriouſly rely upon the depoſition of *Nocey* and his wife, whoſe only knowledge conſiſts, in ſaying, they know nothing about it, except that *Madame de Nocey* thinks, without being able to affirm it, that ſhe has heard the *Abbé d'Or-*

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leans celebrate maſs: draw as many arguments as you pleaſe from their ſilence, it is not by negative preſumptions, but by poſitive facts, that the cauſe muſt be decided.

After this, nothing more is neceſſary than to exhibit that crowd of inferior domeſtics, that have been examined on the part of *Madame de Nemours*, a cook of *Madame de Longueville*, a tailor, a footman of the *Comte de St Pol*, a coachman and his wife, a porter and his wife, a poſtilion, a groom, a muleteer; the moſt conſiderable are a chamberlain, and a maſter of the pantry. None of theſe domeſtics followed the *Abbé d'Orleans*, upon the important journey by the river *Loire*, none of them were attached to his perſon; even the perſon who aſſumes the quality of his coachman ſays, that at the time of the teſtament and long before he had no carriage, becauſe he had given it to the *Comte de St. Pol*; and beſides you will ſee by the depoſitions, or rather you have already ſeen, that a carriage was to him a very uſeleſs equipage: ſuch is the quality of the witneſſes, examined on the part of *Madame de Nemours*.

But what do we find on the other ſide? Is it a ſet of witneſſes, a compariſon with whom would, as you have been told, be injurious to thoſe of *Madame de Nemours*? They are all ſuch as had the honour of being continually about the perſon of the *Abbé d'Orleans*; they are thoſe in whom the family repoſed the care of his conduct, thoſe who accompanied him throughout, who ſaw him, who followed him upon all occaſions, finally, thoſe whom *Madame de Longueville* honoured with her moſt intimate confidence, and who filled the moſt conſiderable employments in her family. They are, in a word, of the quality of thoſe domeſtics whom the diſpoſition of the civil law required to be called, in default of relations, to a family council, and whom the prætor conſulted upon the intereſt of pupils. *Requirat.* (prætor) ſays the law 58. *ſ.* 11. *ff. de reb. eor. qui ſub tut. vel cur. ſunt ſine decreto non alien. Requirat neceſſarios Pupilli, vel Parentes, vel Libertos aliquot fideles.*

Two almoners of the *Abbé d'Orleans*, two gentlemen, the *Sieur Deſgoureaux*, and the *Sieur de Gaſtines*, who accompanied him in his journies, a valet de chambre, the ancient domeſtic, faithful to his maſter until his death, and who ſerved him in his two conditions of ſanity and inſanity: ſuch are the principal witneſſes from the domeſtics of the *Abbé d'Orleans*. Let us add the domeſtics of *Madame de Longueville*: the *Sieur de Billy*, her laſt ecuyer, his wife, who performed the functions of a lady of honour, *Marguerite le Baſtia*, her firſt femme de chambre, add to theſe witneſſes, two femmes de chambre of *Madamoiſelle de Vertus*, who reſided in the *Hôtel de Longueville*, a page of the *Comte de St. Pol*,

who commonly attended the *Abbé d'Orleans*, and his principal *Maitre de Hotel*, whom *Madame de Nemours* at firſt choſe for one of her witneſſes, but afterwards rejected, expecting him to be unfavourable to her. Let us alſo include *Tixier*, who from his free acceſs in the houſe *de Longueville*, from the confidence of the *Prince de Conty*, of *Madame de Longueville*, and even of the *Abbé d'Orleans*, from the inſpection of his conduct up to the very time of his death, may be deemed as important as the domeſtic witneſſes. Here are 40 witneſſes, ſuch as a perſon would wiſh for if he had not, ſuch as he would chuſe, if it was cuſtomary, upon theſe occaſions, to ſelect a liſt of witneſſes, as they ſelect a liſt of relations, ſuch, in ſhort, that they cannot even find two on the part of *Madame de Nemours*, who could, we will not ſay, balance their authority, but even enter into a compariſon with them, and diminiſh their ſuffrage.

It is true, that after this we find in the inqueſt of the *Prince de Conty*, ſeven or eight domeſtics of an inferior order, and whoſe quality is ſimilar enough to that of the witneſſes of *Madame de Nemours*; but the eſſential difference which is obſervable, is that in the inqueſt of *Madame de Nemours*, theſe witneſſes have hardly any body at their head to render them reſpectable, whereas, thoſe on the *Prince de Conty* are ſupported by 40 principal officers, whoſe teſtimony communicates its force and virtue to the depoſitions of the ſubaltern officers, and gives them a degree of certainty, which they perhaps would not have in themſelves.

After having made this examination, and parallel of the quality of the witneſſes, we might now enter into a compariſon of the facts, but we think it neceſſary previouſly to diſcuſs ſome general ſuſpicions which each of the parties oppoſes to the inqueſt of the other.

On the one ſide they accuſe the perſons employed by the *Prince de Conty*, of having aſſigned the *Chartreaux* at *Orleans*, and of having afterwards prevented them from giving their teſtimony, becauſe they foreſaw that their depoſitions would not be ſuch as was wiſhed for. But if they are not deceived in their concluſions in this fact, the counſel of *Madame de Nemours* ſhould begin with applying the ſame exception to themſelves, ſince we ſee that after having aſſigned the *Sieur David de Marpré*, they have nevertheleſs prevented him from depoſing in the inqueſt of *Madame de Nemours*; and he would never have been examined, if the counſel of the *Prince de Conty*, who had intelligence of this proceeding, had not aſſigned him to depoſe in his.

They afterwards throw out ſome ſuſpicions of ſolicitation, and even of ſubornation of witneſſes, and *Madame de Nemours* pretends

tends to have the proof of it in the depoſition of a witneſs of *Angers*, who ſays, that the *Abbé de Jumeau*, and the *Dame de Ris*, came to requeſt him to give them a declaration ſigned by him; but beſides that it only appears by the depoſition of this ſingle witneſs, that they have taken any improper means, to obtain from him a favourable depoſition, we think we may ſay in a word, that it is ſurpriſing they ſhould rely upon theſe kind of facts, on the part of *Madame de Nemours*; when three poſitive witneſſes, in the inqueſt of the *Prince de Conty*, concur in depoſing that a cavalier, diſguiſed as a monk, preſſed them to depoſe in favour of *Madame de Nemours*, offering ſtrong menaces if they did not, and advantageous offers if they did, and left them, ſaying, you have to do with a ſtrong party.

Laſtly, we cannot help taking notice here of a fact, which took place at *Saumur*, with reſpect to a perſon of the name of *Barat*. When ſhe appeared before the commiſſary, inſtead of preſenting the proceſs of her aſſignation, ſhe preſented her depoſition ready written. The procureur of *Madame de Nemours* demanded an acknowledgment of this; the commiſſioner granted it, and went to hear maſs, after which he was called upon to interrogate the witneſs upon this fact. The witneſs declared that as it was a long time ſince the facts to which ſhe depoſed had taken place, ſhe requeſted one of her neighbours to write, under her dictation, all the circumſtances, which ſhe from time to time recollected, and that ſhe had cauſed them to be read over to her, before ſhe came to give her depoſition, as ſhe could not either read or write.

Whatever we may ſay of the truth and conſequences of this fact, we ſhall always think it much leſs important, than the rumour of the approaching canonization of the *Abbé d'Orleans*, given out at *Orleans* and elſewhere, and ſpoken to by ſeveral of the witneſſes, in the inqueſt of the *Prince de Conty*. Three witneſſes from *Orleans* depoſe to it particularly; amongſt the reſt a *Carmelite*, who is the 35th witneſs of the *Prince de Conty*, declares, that a perſon employed by the agents of *Madame de Nemours*, aſked him if he had not ſeen *virtuous actions performed by the Abbé Orleans*, and ſaid that he was a ſaint.

But why ſeek in the inqueſt of the *Prince de Conty*, for the proof of this fact, of which you diſcover all the conſequences, ſince it is contained even in the inqueſt of *Madame de Nemours*; and her 43d witneſs declares that he came to *Paris* upon the ſolicitation of a perſon on behalf of *Madame de Nemours*, who told him that ſhe did not care for the ſucceſſion of the *Abbé d'Orleans*, but that ſhe wiſhed to ſhew that he had lived as a ſaint.

After this, Sirs, we ſhall leave it to be judged, which of the two

parties has moſt intereſt in wiſhing that theſe ſuſpicions had never been introduced; we ſhould have thought ourſelves warranted in paſſing over them in ſilence, if the parties had not made them a conſiderable point in the cauſe; we have ſtated the facts without drawing any inference from them. We even wiſh that it was poſſible to blot out the remembrance of them, and all that we can ſay and think upon this ſubject is, that if it be true that the blind zeal of inferior officers has induced them to take thoſe oblique and indirect ſteps, of which we would always willingly doubt, we are at leaſt perſuaded, in common with the public at large, that they have herein acted contrary to the intention, contrary to the ſentiments, contrary even to the orders, of the parties whom they have the honour to ſerve; and if the parties themſelves could have the ſlighteſt ſuſpicions of it, they would revolt even more than ourſelves againſt ſuch conduct, and would be the firſt to diſavow it, with all the publicity which their wounded honour would require from them upon ſuch an occaſion.

Let us ſuſpend then our judgments in this reſpect, and without dwelling longer upon the external parts of the proof, let us endeavour to penetrate into its interior ſubſtance, and confine ourſelves to the examination of two queſtions of fact, which involve all the difficulty of this cauſe.

Was the *Abbé d'Orleans* in a ſtate of formed inſanity? That is the firſt queſtion.

Is it to be preſumed that the inſanity was conſtant, or on the contrary may it be ſuppoſed that there were favourable intervals, in which he might make his teſtament? This is the laſt and not the leaſt important part of this cauſe. After having read the principal depoſitions on the one ſide and the other, it only remains to connect, to arrange, to ſtate the facts in ſo plain an order, that you may deduce from them all the conſequences which are neceſſary for the proof of ſanity or inſanity. But as ſanity is conformable to the order of nature, and inſanity is contrary to it, as the one is preſumed without any proof, and the other ought to be proved, we will examine firſt, whether the *Prince de Conty* has eſtabliſhed a caſe of inſanity, and afterwards whether *Madame de Nemours* has eſtabliſhed a ſtate of ſanity in ſo inconteſtable a manner, as to deſtroy all the preſumptions of inſanity, or at leaſt to render them doubtful, equivocal, and uncertain.

Let us here follow the general diviſion, which has been traced by the parties themſelves; let us conſider the *Abbé d'Orleans* in two different ſtates, let us diſtinguiſh two perſons in one, a public perſon whom we ſhall contemplate in his eccleſiaſtical functions, a private perſon whom we ſhall conſider in his private actions.

actions. Let us add to these two general facts, a third, not less important than the preceding, that is the judgment which strangers, which his domestics, and his own family pronounced upon his situation. To this the whole proof of insanity is reduced. We shall not distinguish it any longer by places, but by the kinds of actions; and that we may bring before you, as in so many pictures, all the facts of the same class, each of which makes one of the particular traits, of which the general character of the *Abbé d'Orleans* was composed, let us examine first, what the *Prince de Conty* has proved concerning the ecclesiastical functions. Of these we may distinguish four kinds:

Prayers and other acts of general piety.

Exhortations, catechisms, preachings.

Confessions—The mass.

These four articles deserve to be examined separately.

Let us begin with the prayers and other acts of general piety. How were these performed by the *Abbé d'Orleans*? You remember the account given by the witnesses.

That continual agitation in the church of *St. Maur*, which *Follard* depicts in his deposition. The *Abbé d'Orleans* was restless, agitated, going sometimes to the altar, sometimes to the sacristy, returning to the choir, passing along the nave, running to the bells. All the people, witnesses of this unsteadiness, behold him with astonishment, and his quality of *Duc de Longueville* renders the scandal still more glaring; but these were only equivocal signs, feeble forerunners of insanity, which we may pass slightly over, as they did not prevent his emancipation.

Let us resume the succession of facts. Let us see the *Abbé d'Orleans* go to *Tours*, enter the monastery of *Minimes*, require to be conducted to the chapel of *St. Francis de Paule*, pray the person who took him there to leave him alone to repeat the service, thunder out with a loud voice when alone in this chapel, *Deus in adjutorium*, in the same tone which is used in a full chant, scarcely staying there time enough to say a *Miserere*, says the witness, come out immediately afterwards without having said his breviary, walk deliberately in a small wood in the midst of a fall of snow, fly precipitately at the sight of his domestics who came in search of him, and leave the members of the convent astonished at the derangement of his mind.

Let us see him afterwards arrive at *Saumur*, walk with precipitancy along the quay without a hat, running here and there as a man possessed (*comme un extravagant*,) these are the words of the witness, enter the inn calling aloud Κυριε ελεισον, Κυριε ελεισον; this we learn from a witness of *Madame de Nemours*; continuing his

recital in the inn, and perſevering in this exerciſe until he got into the chamber that was prepared for him.

Let us examine what he did at *Saumur*. He goes into a church celebrated by the devotion of the people of that province, called the church of *Notre Dame des Ardilles*. He falls upon his knees before the image of the virgin, pours out his benedictions with an unuſual elevation of his arms, riſes in a hurry, leaves his hat upon the ground, runs to the chapel of the late *M. de Servien*, croſſes himſelf three or four times, enters into the ſanctuary, mounts upon the ſteps of the altar, makes three grand benedictions, returns with precipitation to the baluſtrade of the great altar, croſſes himſelf again, gives the ſame benedictions, runs with the ſame quickneſs out of the church, leaves his hat there; his people run after him, bring him back into the church, to the place where he fell upon his knees at his entrance. The perſons who ſaw theſe facts pronounced the ſame judgment of his inſanity.

This is not the only inſtance, of his giving extraordinary benedictions which were regarded as ſigns of folly. At a village near *Orleans*, he walked at a great rate along a wall. Every body was ſurprized to ſee him coming with this precipitation, making at every ſtep profound genuflexions, as if he was at the holy ſacrament; bleſſing himſelf eagerly in riſing, his meeting the witneſs who recounts this fact, did not divert him from this painful and abſurd exerciſe.

At length he returns to *Paris*, where he is often met on the grand quay, *mumbling*, ſays a witneſs, in his diurnal; he is ſeen at the Hoſpital of Charity, *ſerving the ſurgeon's boys, having on an apron*, (ceint d'une ſerviette) *carrying the plaiſter, ſaying that he had no greater pleaſure than in ſeeing them cut off an arm or a leg*, running away as ſoon as any body appeared by whom he might be known, or concealing himſelf in the beds of the patients, and making every body who ſaw him exclaim, that he had loſt his underſtanding.

Let us add to theſe facts, one which is ſubſequent indeed to the laſt teſtament, but following it ſo cloſe that it may be joined with the others; it took place about fifteen days after the teſtament. The *Abbé d'Orleans* enters into the church of *La Breſle*, (a village in the neighbourhood of *Lyons*,) he there finds the people aſſembled at a ſolemn feſtival, the ſermon having begun in the middle of the pariſh maſs. He enters, having his night-cap under his arm, with his hat; he goes to aſk with a loud voice for veſtments for the celebration of maſs from the *Curé*, who was hearing the ſermon; the *Curé* anſwers that he will give them him as ſoon as the grand

maſs

maſs is finiſhed. He is ſo indignant at this anſwer, that he runs out with precipitation, lets his night-cap fall in the church, and ſets off in an inſtant from the place. At the diſtance of two leagues he diſcovers the loſs of his night-cap, ſends a man expreſs to look for it. They appeaſe him by telling him, that they will buy him a new one at *Lyons*, and in fact, it appears by the regiſters of his expence, that one was bought for him there.

Such is the firſt trait in the picture of the *Abbé d'Orleans*, reſpecting his prayers and other acts of piety. Let us afterwards examine him in his exhortations and preachings; this is the ſecond kind of his eccleſiaſtical functions.

What are the places he choſe for catechiſing and giving inſtructions? Sometimes the chapel of *Saint Maur*, ſometimes that of the *Hotel de Longueville*, and theſe were the moſt ſuitable places, ſometimes in the ſtables, ſometimes in the chamber of the footman; once he ſtopped in the country near *Saumur*, to preach to the peaſants; a coach-houſe is the place which he choſe at *Nantes* for catechiſing; at *Paris* the gargottes, theſe are the terms of the witneſſes, and the ſmall pot-houſes, the common receptacles of the dregs of the people, are his theatres, and he preaches with more pleaſure to people who are drunk than to others, becauſe they do not give him any anſwer. Laſtly, the very ſtreets of *Paris* are the places of his catechiſing and giving inſtructions to beggars.

All hours as well as all places appeared to him proper for his exhortations. He interrupted himſelf in the middle of low maſs at *Saint Maur*, in the *Hotel de Longueville*, to make a kind of preaching; the time between eleven and twelve at night, or at day break, appeared to him particularly ſuitable for the inſtruction of the domeſtics; he preached to them even in their beds, and abſolutely forbade their riſing.

What were the ſubjects of his diſcourſes? You recollect the ſingular fact of the funeral oration of the *Curé of Saint Samſon le Angers*, a fact proved by the depoſition of *Metayer*, who ſays, that the *Abbé d'Orleans* repeated to him a part of what he had ſaid in his ſermon, which was *nothing but a tiſſue of extravagancies*, proved alſo by the depoſition of *Remi Dumont*, who ſays, that *Perquier*, valet de chambre of the *Abbé d'Orleans*, remonſtrated with him on account of this funeral oration of a *Curé* whom he had never known; proved by the teſtimony of *Deſgoureaux*, who ſays that *Metayer* told him of it at the time; by that of *Follard*, who ſays, that the action was ſpoken of in the *Hotel de Longueville*, as a trait of folly; and finally, by the depoſition of one of the witneſſes of *Madame de Nemours*, who ſays, that the *Abbé de Boiſſemont*, who was very much attached to the *Houſe* of *Longueville*, was ſorry

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for what the *Abbé d'Orleans* had done at *Saint Samſon le Angers*; a circumſtance which perfectly accords with the relation of the witneſſes of the *Prince de Conty*.

In what manner did he procure auditors? He preached to the beggars in the ſtreet, he ſeized them and pinched them to compel them to hear him. He preached to his domeſtics at *Angers*; if they fell aſleep or laughed, he went to pinch them, or give them blows under the chin, to force them to attend to him.

Laſtly, how did he acquit himſelf of this important miniſtry? Thoſe who heard him, ſtate that there was no meaning in what he ſaid, he became the ſubject of a thouſand indecent railleries in the pot-houſes where he catechiſed; and one of the moſt common fruits of his exhortations was the mockery and deriſion of thoſe to whom they were addreſſed. *Madame de Longueville* was ſeized with grief, ſhe herſelf related many wild circumſtances, and amongſt others, that which has been read to you in the depoſition of *Tenier*, and what the *Abbé d'Orleans* ſaid to an aſſiſtant of the cook, *My brother, do not call me any longer his highneſs, call me his lowneſs.* (*Mon frere, ne m' appelle plus ſon alteſſe, appelle moi plutôt ſa petiteſſe.*)

Such were his inſtructions. Next ſee what was his character with regard to confeſſion. We may diſtinguiſh here two kinds of facts, the one particular, the other general, which, although ſerious in themſelves, are ſtill more conſiderable, becauſe they include a perfect proof of the particulars.

Let us run over thoſe facts which are already known to you by the relation of them having been ſo often read in your audience.

By how many different characters have the witneſſes delineated that ſurpriſing paſſion, that exceſs of furious zeal which made the *Abbé d'Orleans* always deſirous of confeſſing all kinds of perſons at all times and in all places? Some of them deſcribe him to you as either employing prayers or uſing menaces, others repreſent him as giving money, of which he was naturally avaricious, as even making uſe of actual violence to oblige the domeſtics of the *Houſe* of *Longueville* to confeſs themſelves to him, and that without its being proved that he had ever obtained permiſſion in *Paris*. He would influence a footboy by fear of a cane; and, not content with theſe ſlight meaſures, he threatened to pull out his tooth; he went further, and forced an iron crow into his mouth to make him fall before his feet and confeſs his ſins; he endeavoured to tempt a prieſt ſuſpended by the biſhop of *Angers*, by offering him his credit and money, provided he would conſent to his blind ardor to fill a miniſtry, of which his family judged him incompetent. He obtains by ſurpriſe upon his journies permiſſions to take confeſſions, and how does he obtain them? Is it after an examination of his

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capacity and morals? It is, on the contrary, by means that would be criminal in a perſon in poſſeſſion of reaſon. He ſuborns an eccleſiaſtic, he ſends down by a valet de chambre a purſe full of crowns, and the permiſſion granted him at this price becomes at once the ſad proof of the *Abbé*'s derangement of mind, and of the other's corruption of heart. If any body aſks him by what title he confeſſes, he anſwers, *that he laughs at the rector, the biſhops, the archbiſhops, that he is of the blood royal, and has a right to confeſs.* Sometimes he ſays, *that he has a general permiſſion* from the *Archbiſhop* of *Paris*, who could not give a general permiſſion, and who never appears to have been willing to give even a particular one.

It is neceſſary to add to all theſe facts, which prove the unlimited paſſion of the *Abbé d'Orleans* for taking confeſſions, a detail, which would be almoſt infinite, of the extravagancies which he fell into in the exerciſe of that awful miniſtry.

Shall we ſpeak of the times which he choſe for taking confeſſions? You remember what he did at *Nantes*, you know that he called up the ſtable and tailor boys at four o'clock in the morning to oblige them to confeſs to him. At what places did he take confeſſions? You have ſeen him confeſſing the ſtable boys in the *ecurie*, the tailor boys in the place where they ſlept, a chimney ſweeper in the inn-yard, where the *Abbé d'Orleans* ſat on a ladder to take his confeſſion, and afterwards gave him a piece of money as the reward of his complaiſance. They have wiſhed to raiſe an ambiguity upon the fact of the confeſſion of a valet of the *ecurie*; it is true, that a witneſs ſays, that one of the valets whom the *Abbé* confeſſed was ill, and died two days afterwards; but the ſame witneſſes ſhew that he confeſſed ſeveral others, and one of them was ſo little ill, that he on the ſame day got drunk. You remember particularly the grand fact of the priſoners of *Nantes*, whoſe confeſſion the *Abbé d'Orleans* went to purchaſe: all thoſe who had the weakneſs to receive his money confeſſed to him every day; even a criminal already condemned to the galleys accuſed him of having revealed his confeſſion, and ſaid that he ought to be burned. The *Abbé d'Orleans* believed him upon his word, and gave him money not to mention it.

In ſhort, having been the object of contempt to the valets and ſervants of the inn, and the unhappy ſport of the priſoners at *Nantes*, he returns to *Paris*, and, poſſeſſed by the ſame deſire of taking confeſſions, he goes to the monaſtery of *Picpus*; he there examines all the places of confeſſion, tries them one after another, and does not find any that ſuits him; and although a ladder had appeared before a proper ſituation for taking a confeſſion, no place will do now but the ſacriſty. There ſatisfied with the ſituation of

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the confeſſional, he ſays that he would confeſs for eight, ten, or a dozen hours together. The ſuperior of the monaſtery is witneſs of this fact, and is equally aſtoniſhed at the weakneſs of the *Abbé d'Orleans*, and at the patience of his family.

Let us alſo add the fact ſpoken of by *Pollard*, that important intelligence which was given of what paſſed at the *Hoſpital of Charity* to the almoner of *Madame de Longueville*, that the *Abbé d'Orleans* abſolutely inſiſted upon confeſſing the patients, and that his fury carried him ſo far, that he gave ſome of them abſolution without their having confeſſed to him. But there are particular facts enough without this; let us proceed to the more general ones which confirm all the others.

And what are theſe general facts?

The firſt is the continual attention of *Madame de Longueville*, to prevent her ſon from taking confeſſions; an attention proved by the orders which ſhe gave to *Madame de Billy* to watch him in her houſe; by thoſe which ſhe gave to *Metayer* to prevent permiſſions being obtained by ſurpriſe for the *Abbé d'Orleans*, orders which *Metayer* has executed. This is not denied on the part of *Madame de Nemours*.

The ſecond fact is the indignation of *Madame de Longueville*, when ſhe learned that the wife of one of her officers had had the weakneſs to confeſs to her ſon. How does ſhe ſpeak of this action? She ſaid *it was an abuſe of the ſacraments*.

The laſt fact is the letter which the late *Prince de Condé* wrote to the *Archbiſhop* of *Lyons*, to requeſt him to revoke a permiſſion which the *Abbé d'Orleans* had obtained from him by ſurpriſe, under the name of *John* of *Paris*.

Shall we ſay after this, with *Madame de Nemours*, that if *Madame de Longueville* and the *Prince de Conty* prevented the *Abbé d'Orleans* from taking confeſſions, it was becauſe they thought that function too humiliating for a nobleman of his quality? But who can ſuppoſe that ſo great a prince and ſo pious a princeſs could think that the function of a judge in the ſacred tribunal of penitence, that the auguſt exerciſe of the ſupreme power of binding and releaſing was beneath the moſt elevated birth? It has often been ſaid, that the ſtate of a ſinner, who, in the humble poſture of a criminal, implores for favour, was a humiliation uſeful but painful to nature; it has never hitherto been heard, we believe it has never been thought, there was any thing low and humiliating in the function of a confeſſor; and if *Madame de Longueville* had contemplated it in this manner, (which aſſuredly was very far from the dignity of her ſentiments,) would ſhe have ſaid, even upon ſuch ſuppoſition, *that it was an abuſe of the ſacraments* to

confeſs

confeſs to the *Abbé d'Orleans?* Who does not ſee in the force of this expreſſion what ſhe thought, what ſhe felt upon the ſituation of her ſon?

But let us go to the fact of the maſs, where we find as with reſpect to the confeſſions, both particular facts and general; particular facts which regard either his exterior appearance in ſaying maſs, or his manner of ſaying it, the ſingularities which were obſerved in it, the indecencies which he committed, or the impreſſions which his conduct in this reſpect made upon the mind of the ſpectators.

Habited as a poor prieſt, and frequently unknown, he affected to appear as a mendicant. *He ate an allowance of pottage with his fingers, in the porter's lodge of the jacobins, in ſo offenſive a manner, that ſome ſacriſtans refuſed to let him have the veſtments.*

His eagerneſs for ſaying maſs led him to alight from horſeback in paſſing a church at *Angers*. He hardly allowed them to take off his ſpurs, and continuing in his boots, he inveſts himſelf in the ſacred habits; he goes to ſay the maſs in this condition. A prieſt and one of his domeſtics remonſtrate with him, he burſts out a laughing and remounts his horſe. It is true, that one of the witneſſes of *Madame de Nemours* pretends that the *Biſhop* of *Angers*, to whom an account was given of this fact, anſwered, that there was nothing indecent in it.

If this anſwer was really given, we doubt very much, whether all the circumſtances could have been explained to him. But let us proceed to facts of more importance.

In what manner did the *Abbé d'Orleans* celebrate maſs? With ſo much precipitation, that every body was ſcandaliſed at it.

He fell into ſingularities which were never ſeen in any other perſon. We ſee him twice make a ſtop in the middle of low maſs, to preach to two peaſants of *Saint Maur*, and ſome domeſtics of the *Hotel de Longueville*.

But what ſhall we ſay to the grave and ſcandalous indecencies which took place both during the continuance of maſs, and afterwards?

During the maſs, *Grapin* ſtates to you what took place in ſaying *ite miſſa eſt*, he adds aloud, "*let them put a ſteak on the gridiron for breakfaſt.*" *Madame de Billy* relates another adventure ſo ſad and painful to *Madame de Longueville*, who was puniſhed for her curioſity in hearing him ſay maſs. Between the goſpel and the oblation he interrupts the ſacrifice, and with the tone of a perſon in a ſtate of agitation, he ſays aloud, "*give me a chamber pot.*" He repeats the ſame thing ſeveral times very quick, and goes from the altar, and, without maſs being finiſhed, he runs from one ſide to the other,

other, crying out more than thirty times, "*a piſſer, a piſſer.*" We repeat theſe words with pain, but ſince they have been heard with grief in the temple of religion, we may be permitted to repeat them with the ſentiment in that of juſtice; and in fact, ſhe had ſeen too much. This fact only paſſed in the preſence of *Madame de Longueville*, of *Madame de Billy*, and a little boy, who ſerved the maſs to the *Abbé d'Orleans*; but ſeveral other domeſtics of the family, that is to ſay, *Fouilleuſe*, *Gaſtine*, *Follard*, and *Daſlon*, all ſay that it was ſpoken of in the *Hotel de Longueville*, as a trait of inſanity. *Gaſtine* mentions all the important circumſtances of it, and accords perfectly with *Madame de Billy*.

How have they combated this ſtriking fact? They tell you that it was not probable; but in the firſt place can they elude a fact proved, by conjectures and contrary probabilities? Beſides, where is the want of probability? It is ſaid, that many circumſtances muſt concur before ſuch a fact is admitted as probable; and what are thoſe circumſtances? is their concurrence ſo difficult? In the firſt place, it requires a wiſh in *Madame de Longueville* to judge for herſelf, of the manner in which her ſon ſaid the maſs. Is there any thing in that which has not the appearance of being true? It was requiſite that ſhe ſhould wiſh to obſerve it without its being known. Nothing more ſenſible and natural. It was neceſſary to execute this deſign, that ſhe ſhould go acroſs the (court of the) *Hotel de Longueville*, and how could ſhe do that without being obſerved? There were a thouſand ways of preventing it, but you ſee that after all ſhe did not ſucceed, ſince ſome of her domeſtics knew of it at the time. Finally, it was requiſite that no perſon ſhould be preſent at the *Hotel de Longueville*, to attend the celebration of this maſs; and what difficulty is there in believing that? What fact could ever be certain if ſuch objections to its probability were ſufficient to render it doubtful?

Let us finiſh the facts relative to the celebration of the maſs, and for that purpoſe let us recal what paſſed at *Orleans* in the *Church des Carmes*. Two witneſſes, both prieſts, both regulars of the ſame order, teſtify this fact. The *Abbé d'Orleans* ſaid the maſs with a great precipitation; he returned to perform his thankſgiving in the ſanctuary, threw againſt the credence * a platter which they preſented to him, and threw down a wax taper, which was broken into ſeveral pieces. A regular prieſt aſcends the altar, opens the tabernacle to give the communion to ſeveral perſons who were at the feet of the baluſtrade, and at that moment the communion cloth being on the baluſtrade, the *Abbé d'Orleans* leaped briſkly

* A cupboard for keeping the plate and other things uſed in the celebration of maſs.

briſkly over it, and ran on tip-toe with an extraordinary and ſcandalous precipitation. Two perſons who were apparently his domeſtics wiſhed to follow him, and leaped after him over the baluſtrade. The prieſt called out againſt the indecency of this action, and is to-day the firſt witneſs of it. It is true, that the other eccleſiaſtic who ſpeaks to the ſame fact, ſays, that the *Abbé d'Orleans* paſſed as in leaping *(paſſa comme en ſaltant)* over the baluſtrade; but he agrees in all the other circumſtances, and this expreſſion hardly changes the nature of the action: they both add, that the ſame thing took place at two different times. From hence it has been inferred, that the action is not very indecent, as the *Carmelites* would not in that caſe have ſuffered the *Abbé d'Orleans* to have come a ſecond time to ſay maſs in their church; but if their having too great a reſpect for him prevented their refuſing him the veſtments, if their complaiſance degenerated into a real meanneſs, what has that in common with the fact of inſanity, which is now the object of inquiry? And can ſuch colours as theſe efface ſo marked an action, and ſo ſtriking a trait of derangement? And let it not be ſaid, that the witneſſes who relate this fact, did not regard it as a proof of inſanity; the one ſaid publicly, that it was not ſuch an action as could come from a perſon in his ſenſes; the other, that the *Abbé d'Orleans* muſt have had a very weak mind to fall into ſuch improprieties.

Here is a firſt example of the impreſſion which theſe and other ſimilar actions have made upon the minds of the ſpectators. There is another more ſtrong related by a domeſtic of the almoner of *Madame de Longueville*, who ſhews, that his maſter was one day obliged to force the *Abbé d'Orleans* from the altar, between the epiſtle and the goſpel, becauſe he was not in a condition to perform the ſacrifice.

All theſe particular facts become more probable by the general facts which accompany them.

If theſe facts were not certain, why was the inclination, which led the *Abbé d'Orleans* ſo conſtantly to wiſh to ſay maſs, regarded as a *kind of fury?* Theſe are the terms of the witneſſes; whence aroſe that deep diſpleaſure, thoſe piercing afflictions of *Madame de Longueville*, whom ſome of the witneſſes repreſent as penetrated with grief, bathed in tears, proſtrated to the ground, groaning before God, and opening her heart in his preſence, when ſhe learned that her ſon had ſaid the maſs, and ſeeking to expiate his irregularities by the tears of her repentance?

Why ſhould ſhe ſend to certain churches to deſire that they would not admit the *Abbé d'Orleans* to the celebration of the maſs? In ſhort, why, from that ſorrowful day, when ſhe ſaw with her own eyes what ſhe with difficulty would have believed, if it had

had been related to her by others, did ſhe abſolutely forbid his being allowed to ſay maſs, ſo that from that time he only ſaid it by ſurpriſe, and without her knowledge, as we are aſſured by ſeveral of the witneſſes? If there was nothing more in the cauſe than theſe general facts, would they not be ſufficient to induce very reaſonable ſuſpicions reſpecting the facts connected with the celebration of the maſs? But we will not dwell upon them at preſent, we ſhall be obliged to touch upon them again in a moment. And after having ſhewn you in four different pictures, what was the character of the *Abbé d'Orleans* in every thing relating to his eccleſiaſtical functions; let us contemplate him in the ſecond point of view, which we before diſtinguiſhed, that is to ſay, as a private perſon, and let us ſee what were his actions in that character.

Madneſs is an inviſible quality, as we have obſerved ſeveral times, but it diſcovers itſelf, it preſents its picture, it betrays and accuſes itſelf by the moſt ordinary actions.

The habit, the exterior appearance, the converſations, the gait, the walks, every thing which we ſee, every thing which we hear, give a public and ſtriking teſtimony of the ſecret and interior diſpoſitions; there is nothing, even the manner of eating and drinking, the time deſtined to ſleep, and the other functions of nature, which may not furniſh proofs of inſanity.

Let us run over theſe points in a very few words, and endeavour to diſcover in them the lively and faithful image of the *Abbé d'Orleans*.

What is the picture which all the witneſſes have drawn of his habit and exterior appearance? He was frequently met in the ſtreets, the moſt frequently in a ſhort caſſock, dreſſed, ſay ſome, as a village prieſt, *(un Hybernois)*, ſay others, as a mendicant prieſt, ſay a greater part of the witneſſes, all over dirt, like an ideot, or a chairman, *crotté comme un Fol, ou comme un Porteur de Chaiſe*, theſe are the different expreſſions; never chuſing to change his linen, in a ſtate which was horrid to behold, frequently covered with vermin, adds one of the witneſſes. He was remonſtrated with on this ſtate, ſo indecent for a perſon of his quality, he anſwered *ſo much the better; and he would have a ſhirt made of chamois, which might never be changed*; a large hat, flapping over his ſhoulders, covered his face in a ridiculous manner, to which he added for an ornament a branch of box; *un battolier*, the toll gate-keeper of a bridge ſeized his hat, and when he gave it him back again, the *Abbé d'Orleans*, ſurpriſed with not finding his branch of box, had a quarrel with him upon this ſubject. Laſtly, we find him at *Paris*, in a ſhort caſſock *(en ſoutanelle)*, and in white ſtockings; they aſk him if he had taken thoſe of his coachman? he anſwers *ſo*

much the better; and if we can add any facts that follow the teſtament, and which took place in leſs than two months afterwards, we might ſay, that he was ſeen without breeches or drawers, going to take his letters of orders to a ſecretary of *Martigues* in *Provence;* and that *Follard,* aſhamed of ſeeing him in this condition, obliged him to return to his houſe, and prevented his ſaying maſs.

He joined to this exterior condition diſcourſes, which the witneſſes regard as proofs of inſanity.

Some of them have ſeen him talking to himſelf in an inn yard, others have ſeen him laughing aloud without any thing to excite it: a great number of the depoſitions ſhew, that *he ſpoke with great precipitation, that he hardly ſpoke two words that had any connection, that he began a hundred things and did not finiſh any, that he held an infinity of extravagant diſcourſes.* Some of them even give us inſtances of his converſation, ſuch as that which he had with *Madame de Billy;* you ſufficiently recollect it, and we conceive the anſwer which was given to it did not appear to you to be very ſatisfactory; ſuch alſo is the diſcourſe which he had with the witneſs who propoſed a hunting party to him; ſuch, laſtly, is that ſpoken of by *Pendrig* the apothecary. It is unneceſſary to refer to them at preſent with more particularity: we haſten therefore to facts of greater importance.

To the habit and diſcourſes of the *Abbé d'Orleans,* let us add, his running about, his promenades, his gait, and all the circumſtances accompanying them.

No deſign appeared in all his rambles, but that of running about at the inſtigation of his inquietude. The ſtreets of *Paris* were the moſt ordinary place of his promenades, and the moſt common expreſſion of the witneſſes is that he *run the ſtreets.* He goes to the place of the Palais Royal, throws money to the hackney coachmen: they aſk him if he would take a coach, he gives no anſwer, and goes away on foot without ſaying any thing. He ſets off to go to *Angers,* and when he has got half way, he changes his mind and goes to *Picpus.*

With whom does he take his promenades? frequently alone, without any body knowing what is become of him; or, if he ſuffers any company, ſometimes he chuſes that of an apothecary, at other times ſome tailors, or barbers' apprentices, and he never teſtifies more joy than when he ſays that he has been living, *(qu'il a fait la vie)* with his good friends the fraters. Such are the terms of the witneſſes.

But at what hour does he begin? frequently at ſix or ſeven in the morning, in the month of *January* and *February.* When does he finiſh them? ſometimes at eleven at night.

His gait is not leſs ſingular than his promenades: a precipitation and extraordinary quickneſs are the ſenſible image of the levity of his mind; always in a ſweat, like an ideot *(un fol)* going almoſt always on tiptoe. Such were his general habits, as proved by the witneſſes. Let us join ſome particular facts. When he was at *Saint Maur*, he had hardly arrived at the *Porte Saint Antoine*, when he jumped from his carriage and run away ſo faſt that nobody could follow him. At *Orleans*, he was ſeen to *leap upon his ſhadow, dancing upon the ramparts of the city, kicking away every thing which lay before him.*

At *Paris*, an apothecary who marks the impetuoſity of his courſe, depoſes, at the ſame time, that he always gave him the higher part of the pavement, and made him paſs the firſt at all the gates.

It is little to have ſhewn you the quality of his promenades, and the ſingularity of his gait; we muſt alſo ſtate in a few words the principal adventures which took place in his continual rambles. He twice paſſed the bridge without paying the paſſage; the firſt time the gate-keeper ran after him, and would have given him a blow if he had not been prevented by a ſiſter of one of the maids of *Madame de Longueville;* the ſecond time the gate-keeper ſeized his hat and that of a page who followed him; fortunately a woman belonging to the *Hotel de Longueville* lends him a few pence, he goes to redeem his hat, and flies into a rage againſt the gate-keeper for having taken away the branch of box.

Is it neceſſary to recal to your recollection the ridiculous combat which he had with the little boys in the court of the *Hoſpital of Charity? Madame de Billy* deſcribes him as running like them, drawing them, and drawn by them. When preſſed to come away, he aſked her if ſhe would be of the party.

But what appears to us to be the laſt degree of his infirmity, is the deplorable ſtate in which ſeveral of the witneſſes have ſeen him *purſued in the ſtreets by the little boys, who threw dirt at him, made him drop his hat, and followed him with continual hootings, which did not ſeem to give him any uneaſineſs;* a fact almoſt incredible in all its circumſtances, if it was poſſible not to believe what is atteſted by a witneſs at *Saumur*, and four witneſſes of *Paris*, all uniform in their depoſitions.

Shall we be aſtoniſhed after this at the anxiety, repreſented by ſome of the witneſſes to have been felt by *Madame de Longueville*, reſpecting the continual ramblings of the *Abbé d'Orleans?* Some freſh account was given to her every day; and had ſhe not reaſon to fear in the end that ſome tragical adventure would terminate, in an unfortunate manner, ſo deplorable a life?

Let

Let us finiſh the picture of the private life of the *Abbé d'Orleans*, by the facts which relate to the neceſſary functions of life, ſuch as eating, drinking, and ſleeping.

We have already mentioned the joy which he teſtified when he ſaid that he had been living with his good friends the tailors or barbers; it was with ſuch perſons as theſe that he delighted to eat and drink. At *Nantes*, he exhorted the wife of a journeyman tailor to confeſs to him, and he afterwards ſent for a pot of wine, which he drank with her. At *Paris*, you have ſeen him go to beg an allowance of pottage at the gate of the jacobins, and eat it with his fingers: and theſe are the moſt honorable places which he choſe for his repaſts. We have already repreſented him going to what the witneſſes call the *carbarets borgnes et des gargottes*, where nobody ever enters but the very loweſt dregs of the people. His manner of eating is regarded by many witneſſes as a mark of his derangement. He eats with perplexity and inquietude, and in a manner exciting horror; exceſſive ſometimes in his abſtinence, and ſometimes in his intemperance; ſometimes he paſſes two hours in a cabarette and drinks one ſmall glaſs of wine; at other times he falls into real exceſſes; and we ſee the heir of the houſe of *Longueville*, the ninth duke of his race, get drunk in taverns, which a common ſhopkeeper would be aſhamed to enter.

His ſleep is not more regular than his repaſts; he ſleeps little, makes a great noiſe during the night, prevents thoſe who lie under him from ſleeping, goes to the beds of his valets, and makes them go into his. This fact is even depoſed to by one of the witneſſes of *Madame de Nemours*, who ſays, however, that it was becauſe his own bed was too ſoft. That reaſon might very well prevent his lying in it, and induce him to order another; but not to make one of his ſervants ſleep in a bed which a counſellor of *Angers* had procured expreſsly for himſelf.

After this, Sirs, you will excuſe our entering into the details which have appeared before you reſpecting the other functions of life, you remember the fact of the pan at *Blois*, of the *Fauteuil* at *Richlieu*; the names alone will recal to your recollection the indecent actions recited by the witneſſes. No anſwer has been attempted to what paſſed at *Richlieu*; but they would efface what paſſed at *Blois*, by the mere negative depoſition of the maſter of the inn, who ſaid that he never heard the fact mentioned in his family; as if ſuch a negation could deſtroy a poſitive fact proved by the depoſition of *Grapin*, who ſaved the *Abbé d'Orleans* from the hands of the cook, who ran after him, and who related the fact at the time to the other domeſtics who now depoſe to it.

What remains after all theſe facts but to add, that if you believe ſome of the witneſſes, his weakneſs was ſometimes changed into fury, and gave the ſad preſages of the ſtate into which he fell a ſhort time after? He ran ſometimes after his people, beating them and abuſing them; the worth of *Madame de Longueville* alone retained them in his ſervice. In the midſt of a converſation full of levity and extravagance, he all at once ſeized *Monſ. de Billy* by the throat; he quitted him laughing like an idiot, and ſaid, *M. de Billy, you are a good man.* He did another act of the ſame kind with regard to a footman; he took up a ſpit in the kitchen, and would have run through *Fouilleuſe*, who was obliged to let him go, not being able to follow him in the ſtreets: *Fouilleuſe* eſcaped the blow and only had his waiſtcoat pierced. At *Lyons*, a ſhort time after the ſecond teſtament, three beggars followed up their prayers with blows, becauſe, under pretence of drawing a tooth for one, he endeavoured to take away his handkerchief. At *Valence*, he imagined that *Grapin* had beaten him, he fell a-crying, and ran after him, ſaying, *to the prevot, to the prevot, you have beaten a prieſt.*

But we have ſaid more than enough as to the two firſt general facts; the eccleſiaſtical functions and private actions: let us proceed to the third general fact, which will be much ſhorter, but not leſs important than the two others, and this fact is the judgment which was pronounced reſpecting the ſtate of the *Abbé d'Orleans.*

We do not call upon you to obſerve, that all the witneſſes, except one, who confounds him with a different perſon, believed him to be in a ſtate of real madneſs; it is a certain fact, but there are others more eſſential.

Three kinds of perſons have formed a judgment upon the ſtate of the *Abbé d'Orleans*; and the judgment of all of them is the ſame:—Strangers, the domeſtics, his own family. Strangers—of this you have already ſeen many proofs; for what would thoſe children ſay who gathered around him, who followed him in the ſtreets, who hooted after him, who offered him ſo many outrages? Do they not render an unſuſpicious judgment of the public, and conſtant opinion of his madneſs? Do not thoſe who followed him at the *Hoſpital of Charity*, and who ſaid, as he went away, that he had loſt his ſenſes, pronounce the ſame judgment? Let us add to all theſe facts, the names which were given him at different places, and which are ſo many proofs of his inſanity, the more ſtrong as they are the leſs affected. At *Orleans*, they call him a bajut, which, according to their dialect, is a fool. At *Nantes*, they ſay in the priſons, that he has a ſtroke of the giblet in his head; and in the inn, a ſtable boy has the inſolence to call him with impunity the *Abbé de haute follie.*

The

The domeſtics do not judge more favourably: we learn from a great number of witneſſes, that his folly was the moſt common ſubject of their converſation. They point at him with their finger, they forget what is due from them to him, and he is the continual ſubject of their railleries; ſometimes they touch their foreheads, to intimate to thoſe who did not know him, the deplorable ſtate of his reaſon; ſometimes they ſay to thoſe who ſpeak of him to them, *it is a great pity to be a fool;* ſometimes they call him amongſt themſelves, *notre biſcarie!*

Finally, did not his own family ſufficiently indicate the unhappy judgment which they had formed of his condition, by the acts which we have already examined; by the ſentiments of grief, of affliction, of inquietude, which the witneſſes have ſhewn in *Madame de Longueville;* by the orders which were given to revoke any permiſſion for taking confeſſions which the *Abbé d'Orleans* might have ſurpriſed; by the precautions which *Madame de Longueville* took to prevent his ſaying maſs; laſtly, by the expreſs prohibition which followed the circumſtance mentioned in the depoſition of *Madame de Billy?* But beſides all theſe facts which you have already remarked, there are ſtill ſome which belong to this ſtage of the cauſe, and which appear to us extremely important.

The firſt relates to the journey of the *River Loire.* Two motives for this journey have been mentioned by the witneſſes; the one, to ſpare his family the grief of ſeeing him, and the ſhame of expoſing him; the other, to get over the interval until his majority, until the precious moment when he was to do all the acts which he was required to do for the benefit of his family.

The ſecond fact regards the ſtay of the *Abbé d'Orleans* at *Paris,* at the time of his teſtament; this ſtay was to be very ſhort according to the intention of the family. The witneſſes and the acts concur in ſhewing us that they would not ſuffer him to return to *Paris* until his majority; and one of the witneſſes adds, that he was to leave it the beginning of *February,* that is, fifteen days after his arrival; but that ſome incidents occurred, which deranged this firſt plan.

The third fact relates to the liberty which they allowed the *Abbé d'Orleans,* both at the time preceding and that following it; a liberty in reſpect to which there are three important facts, that we are obliged to bring before you at this moment. The firſt, that *Madame de Longueville* anſwered thoſe who preſſed her to take meaſures for the confinement of the *Abbé d'Orleans, We are obliged to manage him and ſupport him for the welfare of the family.* The ſecond, that upon another occaſion when they repreſented to her, that it would be proper to reſtrain that liberty which he abuſed; ſhe replied, *Let his*

relations do it, I will not involve myſelf with them, (me les attirer.) And laſtly, when they aſked *Madame de Vertus* why *Madame de Longueville* did not place her ſon in confinement, ſhe anſwered, *Can the poor princeſs do what ſhe would?*

We content ourſelves with ſimply ſtating the facts; and we conceive that you will draw all the neceſſary inferences without our ſubmitting them to you.

The laſt fact which proves the judgment of the family, is what five witneſſes have ſaid concerning the acts. They all remark, that they got the *Abbé d'Orleans* to execute ſeveral acts at that time, and amongſt others, the univerſal donation; becauſe he was incapable of governing his property.

Such, Sirs, is the ſummary, the abridgment, the general plan of the public and private life of the *Abbé d'Orleans;* ſuch are the judgments which ſtrangers, which the domeſtics, which his family pronounced concerning his reaſon. It ſeems that we might now terminate this great cauſe; for what arguments could be ſo powerful as to efface the general impreſſion which reſults from this infinite multitude of different actions, all tending to the ſame point?

We are obliged, however, to enter into the examination of two great and important objections, which have been made againſt theſe facts.

It is aſked, in the firſt place, if it is true, that all theſe facts are proved?

In the next place it is aſked; but are all theſe facts, ſuch proofs of inſanity, that none of them can receive a favourable interpretation?

To anſwer the firſt queſtion, we ſuppoſe there to be two objections, the one of law, the other of fact.

We yeſterday conſidered the point of law. You remember the diſtinction which was ſtated between general facts and particular. When the only queſtion is as to the proof of a particular fact, the concurring teſtimony of two witneſſes is abſolutely neceſſary; but when the queſtion in diſpute relates to a general fact, and moſt eſpecially a fact of habit, it is ſufficient for the witneſſes to agree in the general fact, and is not neceſſary for them to agree in the particulars.

Even if you ſhould allow the ſame rigour which is introduced in criminal affairs, if you ſhould only reckon ten witneſſes as one, there would ſtill be a complete proof by ſeventy-five witneſſes, who would at leaſt be equivalent to ſeven uniform witneſſes; and this general fact being once proved, the particular facts only ſerve to determine the nature of it.

Laſtly, *Madame de Nemours* can never conteſt this principle of law,

law, ſince ſhe herſelf has only ſingle witneſſes. It is true, that there are many who agree as to the kind of actions, for inſtance, there are a great number who ſpeak of the fact of the maſs; but if we were to follow the rigorous principles as to there being only a ſingle witneſs, there are not two witneſſes in her whole inqueſt who appear certainly to have heard the ſame maſs; ſo that the general fact could not be proved, ſince each particular fact would only be ſupported by the depoſition of a ſingle witneſs.

But beſides theſe reaſons of law, there is an invincible anſwer founded in the fact itſelf, and it is this, there are ſeveral grave and important facts proved by the uniform depoſition of ſeveral concurring witneſſes; and thoſe facts which would be ſufficient in themſelves being once eſtabliſhed, the other particular facts are no longer doubtful, becauſe they are branches iſſuing from the ſame root, ſtreams derived from the ſame ſource, parts of the ſame whole; which, from the moment that the whole is certain, are allowed to take their place and incorporate with each other, to compoſe a ſingle body, and an entire tiſſue of actions.

It only remains then to lay before you a liſt of facts, which are proved by the depoſition of two witneſſes.

(M. d'Agueſſeau here recited a ſtatement of the facts, upon which there were at leaſt two depoſitions.)

The ſecond queſtion has ſomething more ſpecious; and certainly there are ſeveral actions, of which the portrait of the *Abbé d'Orleans* is compoſed, which may receive a more favourable explication, and are more conformable to the natural preſumption of ſanity. It is even pretended that there are hardly any, which, taken ſeparately, would not be ſuſceptible of a legitimate excuſe and a probable colour.

We are of opinion, that, in anſwer to this objection, it will ſuffice to obſerve, that all the facts of which we have given an account ſo much at length, may be conſidered in two manners; either ſeparately and detached from each other, or jointly and united together, as forming one entire chain of conduct.

Now, in which ever manner we contemplate them, the proof is equally eſtabliſhed.

If we examine them ſeparately, we ſhall find ſome, which of themſelves are demonſtrative of inſanity, becauſe they can never be explained upon any other ſuppoſition than that of a real derangement of intellect.

If we conſider them together, then they will afford a mutual aſſiſtance, and their union will produce a conviction which we conceive it will be difficult to reſiſt.

This ſhall be ſhewn in very few words.

Let us ſelect a very ſmall number of actions from the multitude of thoſe which we have contemplated, and let us ſee if it was poſſible that a perſon who ſtill retained a ray of underſtanding, a ſpark of reaſon, could be capable of committing them.

The deſire of confeſſing all ſorts of perſons, at all times, and in all places, and that without permiſſion, making uſe of intreaties, money, menaces, violences, to accompliſh this deſign; forcing an iron crow into the mouth of a footman, to extort from him a confeſſion; offering a ſuſpended prieſt to procure his abſolution from the biſhop, provided he would confeſs himſelf to another prieſt without authority, (for ſuch was the *Abbé d'Orleans* when he made this offer); running with a lanthorn in his hand in the ſtreets of *Nantes*, to call up the tailors' apprentices and oblige them to confeſs; capable of revealing a confeſſion without any criminal deſign and from mere levity, or ſuppoſing he had revealed it when in fact he had not; and giving money to a criminal to conceal a fact which he had only invented to put a price upon his ſilence; going to try the confeſſionals at *Picpus* without finding any place ſuitable, except in the *ſacriſtie*, where he offers to confeſs for a dozen hours together; leaping over the baluſtrade of the altar after having ſaid maſs, and at the time when the prieſt was going to give the communion; all thoſe genuflexions, thoſe ſigns of the croſs, accompanied with benedictions, which he made in the church of *Notre Dame des Ardilliers;* undertaking to make, and actually making a funeral oration on a *Curé* who had died two days before, and who was never known to him; turning to the people, and ordering aloud as ſoon as he had ſaid *ite miſſa eſt*, that they ſhould get him a ſteak; calling for a chamber pot in the middle of the maſs, and running like a madman from one ſide of the altar to the other, and the other circumſtances which accompany that indecent action; his preaching in the loweſt pot houſes, delighting to preach to perſons who were drunk, running along the ſtreets expoſed to an infinity of melancholy adventures, purſued and abuſed by the children, become the object of public deriſion, leaping upon his ſhadow, dancing upon the ramparts of a city, faſtening a branch of box to his hat, vehemently lamenting the loſs of it, and a great many acts of the ſame deſcription—Are theſe equivocal actions which may be favourably interpreted; or rather is it not viſible, that as no man in his ſenſes could commit ſuch actions, no man in his ſenſes could ſeriouſly offer to excuſe them?

But what will it be, if, after having detached all theſe facts, after having examined them ſeparately, we connect them with a crowd of other circumſtances, which we have already mentioned? When we run through, as we have done, all the eccleſiaſtical functions, and

and all the moſt ſimple and common actions of private life; when we examine the ſingularity of his prayers, the abſurdity of his exhortations, the general and particular irregularities of his confeſſions, the indecencies which he committed in the celebration of the maſs, the diſorder and want of connection of his converſations, the indignity of his exterior appearance, the wildneſs of his rambles, the meanneſs of the places and companies which he frequents, the ſad, the ridiculous, the humiliating adventures, which occurred to him, his irregularity in eating, drinking, ſleeping, and in all the details of his life; when we join to all this the opinions of ſtrangers, the diſcourſes of the domeſtics, and above all, the unanimous ſuffrages of all who approached him; finally, the judgment and conduct of his family; can there yet remain a reaſonable doubt in any body's mind, can it be ſuppoſed that a perſon in ſuch a ſituation ſhall be ranked amongſt the number of wiſe and reaſonable perſons, capable of diſpoſing of their property? Shall it be ſaid, that he was capable of filling that mediocrity of duties, of proprieties, of offices, which is the loweſt degree of reaſon; and do we not, on the contrary, ſee that all the moſt common duties were effaced from his mind, all propriety forgotten, all the offices of civil life entirely violated? We add further, theſe duties, theſe proprieties, theſe offices, increaſe and augment in proportion to the degree of grandeur and elevation of the perſon who fulfils them; frequently even that which would not paſs for a ſign of inſanity, in a perſon in an obſcure condition, becomes a convincing proof of derangement in one of diſtinguiſhed birth. And if we judge of the *Abbé d'Orleans* by this rule, which nobody can condemn, you will find that there is hardly any of the actions of his life which is not a ſenſible argument of the derangement of his mind; ſince there was hardly any in which he was not wanting in what he owed to the public, to his family, and to himſelf, or which did not diſhonour his name, obſcure the ſplendour of his birth, profane the dignity of his ſacerdotal character, and, to ſay all in one word, in which he did not indicate an entire extinction of ſentiment, a profound forgetfulneſs of himſelf, a ſtupidity and animal inſenſibility, which is one of the principal characters of inſanity.

In this condition it is aſked, whether he could make a teſtament? Let us picture to ourſelves a man of this character, who, in the days of ancient *Rome*, and when a teſtament, inveſted with all the ſolemnities of the law, ought to be publiſhed and promulgated in the comitia like the law itſelf; let us picture to ourſelves then a man, who, in the ſituation of the *Abbé d'Orleans*, had riſen in the midſt of the aſſembly of the *Roman* people, and had brought his teſtament

teſtament to receive its authority by the conſent of all his fellow citizens; would not his preſence and diſcourſe have excited a general ſtir, an univerſal murmur, a kind of inſurrection amongſt the people? Would they not have cried out on all ſides, that this was an abuſe of the law which allowed the making of teſtaments; that it only intended to commit its power to a ſage legiſlature, but not to have placed arms in the hands of a madman? Let 75 witneſſes have riſen at the ſame time, to declare thoſe facts which we have now recited, all of them atteſting the grand fact of opinion and public notoriety, and can we doubt that all the aſſembled people, ſo far from confirming the teſtament of a man, in the ſtate to which the weakneſs of his mind had reduced the *Abbé d'Orleans*, would have inſtantly given him a curator, and have placed him under the ſervitude of a perpetual interdiction?

But without looking for inſtances at a diſtance, let us ſuppoſe that, with an inqueſt like that of the *Prince de Conty*, an application had been made to confirm a ſentence of interdiction; can it be believed, as it has been boldly aſſerted, that there would be any ſerious and real doubt upon the ſubject? Even if the anſwers given by the *Abbé d'Orleans* upon an inquiſition, ſhould be ſenſible and apparently full of reaſon, could they ever efface the prodigious multitude of facts, which form ſo lively an image of the character of his mind? And do you not recollect what paſſed laſt year in a cauſe of ſome celebrity, which was brought before you reſpecting a perſon of the name of *Burſamer*, whoſe interdiction it was required to repeal? He underwent three interrogatories at different times; his anſwers were full of reaſon and good ſenſe. There was only one on which he admitted an action of folly, which he had committed, as he ſaid, by way of penitence. Yet, notwithſtanding the reaſonableneſs of his anſwers, you confirmed his interdiction; and that upon facts contained in his letters, which his anſwers could not deſtroy. It is true, that at the end he conſented himſelf to be interdicted; but independently of his conſent, which was of no great weight upon ſuch an occaſion, you pronounced the continuance of his interdiction. Let us make the ſame ſuppoſition of rationality, in the anſwers of the *Abbé d'Orleans*. However ſenſible they might be, could they obliterate the facts which are contained in the depoſitions of the witneſſes? This appears to us to be abſolutely impoſſible; and if ſuch is the caſe, what are the rules reſpecting interdictions founded on inſanity? Is it not certain that they have a retroſpective effect, that they go back to the moment at which the inſanity is proved; becauſe in theſe interdictions nature anticipates the office of the judge; it is ſhe, properly ſpeaking, who pronounces the interdiction; the judge only declares it, and renders

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it more ſolemn. Thus, in this caſe, the effect of the interdiction would extend to the teſtament which preceded it, becauſe the teſtament is included in the time of a proved inſanity.

Let us finiſh, with a ſingle reflexion, every thing which relates to the inqueſt of the *Prince de Conty*. What is the anſwer oppoſed to the greateſt part of the facts which it contains? All theſe facts, ſay they, may be the effect of an extraordinary zeal, of a profound humility, of a deſire to annihilate, and reduce himſelf to a ſtate of apoſtolical poverty and ſimplicity; in a word, actions of ſanctity, which the children of this world miſtake for ſigns of folly; and, abuſing the holy expreſſions of ſacred writ, they have dared to apply to the *Abbé d'Orleans* theſe words of the book of wiſdom, *Nos inſenſati vitam illorum æſtimabamus inſaniam*; and they have not taken care of avoiding to confirm by that obſervation, all that the witneſſes of the *Prince de Conty*, and even thoſe of *Madame de Nemours*, have depoſed, concerning that rumour of canonization which was ſpread through the cities on the *Loire*. Strange ſolution, injurious to the ſaints whom they have placed in an unworthy parallel with the *Abbé d'Orleans*, contrary even to the intereſts of *Madame de Nemours*, and capable of forming a complete proof of inſanity; for, finally, if all the facts contained in the inqueſt of the *Prince de Conty* can only be explained by ſuppoſing a pretended and imaginary ſanctity in the *Abbé d'Orleans*, what remains to conclude in making this ſuppoſition, which is as abſurd with regard to religion as to probability, except that the *Abbé d'Orleans* was in the ſtate in which one of the greateſt philoſophers of antiquity (Ariſtotle) repreſents thoſe who can renounce the ſweets of ſociety and live in ſolitude? They are, ſays that philoſopher, either above mankind, and exalted even to the throne of God himſelf; or below humanity, and reduced to the ſad condition of ſavage beaſts. May we not apply this idea to the *Abbé d'Orleans?* Either he was elevated by his ſanctity above all human proprieties, or his inſanity had degraded him below the laſt degree of human reaſon. It is viſible that the firſt ſuppoſition cannot be true; it is only neceſſary to read the depoſitions of the witneſſes to be convinced of it. It is profaning the name of *Saint* to give it raſhly to a man capable of deſiring to receive confeſſions from all kinds of perſons, capable of committing all thoſe indecencies which he fell into in ſaying maſs, to a man whoſe life was a dream, a fable, a long night; to a man who got drunk in the loweſt pot-houſes, who did not even reſpect the ſanctity of the tribunal of penitence, and who at a time when he deſired to exerciſe the functions of a judge, rendered himſelf criminal, by the diſcourſes deſcibed in the inqueſt, which combine ſo many kinds

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of folly in a ſingle trait, and can find no excuſe but in inſanity. We bluſh to dwell ſo long in refuting this unworthy compariſon which has been made between a madman and the ſaints.

Let us conclude in one word, that ſince, according to *Madame de Nemours*, the *Abbé d'Orleans* was either actuated by the continual impreſſions of an extraordinary zeal, or the perpetual agitations of a real inſanity; after having ſhown that the firſt has not the leaſt appearance of truth, it cannot but be admitted that the fact of inſanity alone can combine the characters of probability and truth.

Let us proceed, however, to the more ſolid arguments of *Madame de Nemours*; and let us ſee in a few words what are the facts of her inqueſt, by which ſhe pretends to deſtroy that of the *Prince de Conty*.

Let us obſerve, in the firſt place, that the greater part of her facts are negative in two different ways; negative in general, becauſe, as we have already mentioned, a reaſonable action neither excludes the proof nor the preſumption of inſanity; negative in particular, becauſe there is not any one of them which deſtroys the particular facts of the *Prince de Conty*.

Let us make a ſecond general obſervation on the facts of this inqueſt.

There are three kinds; the firſt equivocal, the ſecond adverſe to *Madame de Nemours*, the third alone favourable to her.

The firſt equivocal, ſuch as every thing which relates to the journey of the river *Loire*, a journey uſeleſs in itſelf, a journey in which the *Abbé d'Orleans* and his attendants concurred in concealing his name, a journey little ſuitable to his dignity in all its circumſtances, a journey which the *Abbé d'Orleans* was not at liberty to finiſh when he pleaſed, as you have ſeen in the fact of *Gué de Loré*; a journey, in fine, for which the witneſſes of *Madame de Nemours* do not aſſign any probable reaſon, except the natural inclination of the *Abbé d'Orleans* for a change of place. But if that was the only cauſe, why did they prevent his returning to *Paris*, when his natural inclination led him to do ſo? The witneſſes of the *Prince de Conty* give two reaſons for this journey; the one, to ſpare the family the pain of being a continual witneſs of the diſordered underſtanding of the *Abbé d'Orleans*; the other, to get over the time until he attained his majority.

Let us place, in the number of equivocal facts, that of the precipitation which ſome witneſſes of *Madame de Nemours* remark in the gait and ſpeech of the *Abbé d'Orleans*; that of his rambles in *Paris*, proved by a witneſs of *Madame de Nemours*, who ſaid,

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he had ſeen him return late in the evening on foot, covered with dirt; that of the companions unſuitable to his condition; that of the exhortations made early in the morning to the footmen in their chamber, without permitting them to ſit up in bed; finally, that of ſome witneſſes from *Angers*, who ſhew us that in the houſe of a *Counſellor* of the preſidial of *Angers*, the *Abbé d'Orleans* lay in the bed which had been aſſigned to his valet, and made him lie in his: none of theſe facts are much adapted to give a high idea of the underſtanding of their author, and they accord perfectly with the facts of the *Prince de Conty*.

There is a ſecond claſs of facts, conſiſting of ſuch as are abſolutely adverſe to *Madame de Nemours*. You remember the two witneſſes from *Saumur* and *Angers*; their depoſitions have been read to you on the one ſide, and on the other. You know that one of them deſcribes the *Abbé d'Orleans* as entering the inn, and reciting with a loud voice Κυριε ελεισον, till he got to his chamber; then he ſhews the valets laughing behind him, when he related the hiſtories of which we do not enter into the detail, and making ſigns of deriſion; that the *Abbé d'Orleans* having gone to the capuchins, the witneſs ſaid to the attendants, *your maſter has eſcaped*, and adviſed them to go and ſtay in the ſuburb, *leſt any thing ſhould be found out*; terms which are ſimple and natural, and ſufficiently manifeſt the judgment which was entertained concerning the ſituation of the *Abbé d'Orleans*.

The other witneſs alſo deſcribes the entrance of the *Abbé d'Orleans* into his inn: *as a ſeminariſt, having his beviary under his arm*; he obtains a chamber by the credit of his attendants; he afterwards mentions the two adventures of the lanthorn. The *Abbe d'Orleans* went alone at ſix in the evening, with a lanthorn in his hand in the ſtreets of *Angers*, to the gate of the epiſcopal palace; they followed him at a diſtance, and took notice that when he got there, inſtead of going in he turned back and returned leiſurely to the inn. Another time, at the ſame hour he came into the public place with the lanthorn in his hand, walked round the walls, and without having done any thing returned to the inn; and the huſband of the witneſs related theſe adventures as ſo many acts of folly.

The inference is too clear to require that we ſhould ſtop to draw it.

Finally, there is a third claſs of facts, which are favourable to *Madame de Nemours*.

They are confined within a very ſmall number.

There are three general facts, and five or ſix particular ones.

The firſt general fact is, that the inſanity commenced at the

end of *September*, 1671, from which *Madame de Nemours* concludes, that it had not begun ſix months before the teſtament of *February*, 1671. But it would be much more reaſonable to conclude, as follows: the *Prince de Conty* has proved that the *Abbé de Orleans* was in a ſtate of inſanity at the end of 1670, and the beginning of 1671; then it is not true, that the inſanity did not commence until *September*, 1671.

What are the proofs adduced by *Madame de Nemours*, to eſtabliſh the truth of this important fact?

They are of two kinds.

The one has already been examined, and found inſufficient at the time of your former judgment; ſince, if you had been convinced by the written evidence, that the inſanity did not break out until the month of *September*, 1671, you would not have allowed a proof of its having commenced a long time before. And, in fact, nothing could be more imperfect and equivocal than theſe proofs; the one of which is taken from the conſultation of the relations in *January*, 1672, wherein they call the malady of the *Abbé d'Orleans*, a *preſent infirmity*; by which, it was contended, that they meant to exclude all the time that was paſt, and to confine themſelves preciſely to the preſent moment, when they intimate ſome hopes of obtaining a cure, as if it was not uſual upon this kind of conſultations, never to ſpeak of the inſanity as deſperate and incurable. The other proof was founded upon the terms of a memorial of *Madame de Longueville*; terms which appeared to you very ambiguous at the time, becauſe they contained two incompatible dates. It is there repreſented, that ſeven or eight months after the expiration of his tutelage, and his attaining his majority, the *Abbé d'Orleans* having taken journies into foreign countries, was found to be not in a condition to adminiſter his affairs, by reaſon of the fatigues which he had undergone, and the kind of life which he had led. If you begin to reckon from the time when the tutelage finiſhed, the teſtament falls within the time aſſigned to the ſtate of fury; if, on the contrary, you only reckon from the time of his majority, the fury did not begin until about the month of *Auguſt*, or the beginning of *September*; and although this laſt computation appears more probable, becauſe *Madame de Longueville* joined to this calculation of time the travelling in *Germany*, you however did not conſider this piece as deciſive, whether on account of its uncertainty, or on account of its being impoſſible for *Madame de Longueville* to expreſs herſelf otherwiſe, without impeaching the acts which were the work of the family; or whether, in fine, becauſe theſe terms might very well refer to the commencement of the fury, and not to that of the mere inſanity.

ſanity. And this is the diſtinction with which we are about to anſwer the new proofs now adduced in ſupport of the ſame fact.

We have taken notice of three.

The firſt is a conſultation, without date or name, of a phyſician at *Straſburg*, which is applied with tolerable probability to the *Abbé d'Orleans*, but which ſays nothing that can ſerve to determine the commencement of the inſanity; he only ſays, that there is a very great heat in the bowels of the patient, on whoſe behalf he had been conſulted, and that, *in order to prevent the conſequences which have already cauſed ſome unfortunate accidents, it would be proper to make him take cooling draughts*; and what is there in all this from which we muſt conclude that the inſanity was recent? On the contrary, he ſpeaks of accidents which had already taken place, but does not fix either the times, or places; he ſpeaks alſo of a preceding conſultation: all this leaves the commencement of the inſanity as uncertain as it found it.

The ſecond proof is derived from the accompts of the expence of the *Abbé d'Orleans*; by which we ſee that couriers were ſent to *Paris*, with the news of the melancholy ſtate into which he had fallen; and upon this occaſion there were extraordinary movements, of which there was not any example in the time preceding.

The laſt proof is drawn from the depoſition of two witneſſes of *Sarrebourg*, who ſtate the firſt attacks of fury in the *Abbé d'Orleans*, after having ſaid, that hitherto he appeared to them ſufficiently reaſonable. There are two things in this depoſition, the one that the *Abbé d'Orleans appeared* ſufficiently reaſonable, until theſe firſt impetuoſities, from which they would conclude, that he actually was ſo; but this fact is abſolutely deſtroyed by the writings adduced by *Madame de Nemours* herſelf.

1. The memorial of *Madame de Longueville* fixes the commencement of the fury 8 months at longeſt after his majority. Theſe 8 months expired on the 12th of *September*; therefore, if we were to attach ourſelves ſcrupulouſly to this memorial, we muſt ſay, that from the 12th of *September*, that is to ſay, before the miſſion of *Saint Marie aux Mines*, and before the journey to *Sarrebourg*, the *Abbé d'Orleans* was in a ſtate of fury.

2. The conſultation of the phyſician at *Straſburgh* was previous to the *Abbé d'Orleans* going to *Sarrebourg*, and it marks a declared ſtate of inſanity.

3. The depoſition of *Perny*, one of the principal witneſſes of *Madame de Nemours*, poſitively affirms that the fury broke out at *Saint Marie aux Mines*. Judge after this of the credit due to the witneſſes, who ſay that he appeared rational at *Sarrebourg*.

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The other circumſtance of theſe depoſitions, which agrees with the accompts, relates to the ſending of couriers to *Paris*, and the firſt attacks of fury; but there is nothing in this which contradicts the caſe of the *Prince de Conty*. He does not contend that the *Abbé d'Orleans* was in a ſtate of fury, at the time of the teſtament; he only alleges mere inſanity: and the ſuppoſing a change not from ſanity into inſanity, but from inſanity into fury, is ſufficient to reconcile all the facts which are indicated both by the accompts and the witneſſes.

The ſecond general fact, propoſed to you on the part of *Madame de Nemours*, receives alſo the ſame anſwer. They have particularly called upon you to obſerve, that no precaution was taken againſt the inſanity of the *Abbé d'Orleans*, before the month of *October*, 1671; that they do not appear even to have attempted either his perfect cure, or the alleviation of his complaint, or ſought for even a kind of conſolation, in the application of the moſt ordinary aſſiſtances of medicine.

But as to all the precautions which could be taken againſt him, the kind and character of his inſanity did not require them until the month of *September*; it was calm and tranquil, if we except two or three emotions of fury which a menace appeaſed; and the argument which is drawn from the want of care in applying the remedies of medicine might be very conſiderable, if it did not prove too much, for it might be ſhewn by the ſame reaſoning, that the *Abbé d'Orleans* was never in a ſtate of inſanity in his life; ſince it does not appear that, even at the time of his fury firſt breaking out, any remedy was applied. At *Bourges*, we only find a conſultation of phyſicians, but we do not ſee that any thing was done in conſequence of it.

What then is the only concluſion that can be drawn from this obſervation? It is that to all appearance the derangement of the *Abbé d'Orleans* increaſed by degrees, and in conſequence of a weakneſs in the organs which increaſed with it, and to which any application was conſidered as uſeleſs.

But, without wiſhing to exerciſe our conjectures any further upon this point, let us paſs to the third general fact, which *Madame de Nemours* has proved by her inqueſt. This fact is, that the *Abbé d'Orleans* appeared to the greateſt part of the witneſſes, who have depoſed in favour of his ſanity, to be a perſon of good ſenſe; but this is preciſely what the doctors call the general fact, which can only approach to a real proof, when the witneſſes add, that they were always about the perſon whoſe ſtate is conteſted, ſo that he could never commit any extravagant action without their having been witneſſes of it. Here the witneſſes neither have ſaid

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ſo, nor could ſay ſo; none of the witneſſes commonly attended the *Abbé d'Orleans* except *Perny*, who is a very exceptionable witneſs, ſo that the depoſitions in this reſpect only contain a mere negative, which has no more force than if they had only ſaid, we have never ſeen the *Abbé d'Orleans* commit any actions of inſanity.

The laſt general fact, which *Madame de Nemours* has relied upon more particularly, is the full and entire liberty which was enjoyed by the *Abbé d'Orleans:* maſter of his actions, ſole arbiter of his conduct; they not only never thought of ſcreening him from the malignant curioſity of the public; they never even charged any domeſtic to follow him, to watch over his conduct, to prevent the unfortunate actions which might befal him; and in a ſtate of complete inſanity, according to the witneſſes of the *Prince de Conty*, they ſuffered the eldeſt branch of the *Houſe of Longueville*, and a prieſt, to appear publicly in all the cities of the kingdom, and to proclaim the weakneſs of his mind, the diſhonour of his race, and the blind facility of his family.

Although this argument only forms a preſumption, and a ſimple probability, which is not capable of deſtroying poſitive proofs, it muſt nevertheleſs be admitted, that it would make a great impreſſion if it was not combated by two anſwers, that appear to us equally ſolid.

1. It is true, in general, that to enjoy a perfect liberty is a preſumption of ſanity, but at the ſame time it muſt be admitted, that to abuſe that liberty, as was done by the *Abbé d'Orleans*, is a ſtrong proof of the contrary. There is hardly any action in general, which may not accord both with the character of a man of ſenſe and a madman; but what diſtinguiſhes them is, that the one does it in a reaſonable manner, and the other, by his manner of doing it, evidently demonſtrates his folly. A man of reaſon and a madman may both be maſters of their conduct, but the one uſes becomingly the power which he has over himſelf, the other abuſes it unworthily; or rather, the one governs himſelf, the other is governed; the one conducts himſelf by his reaſon, the other is dragged along by his inſanity. It is not then enough to ſhew that the *Abbé d'Orleans* was free, if they do not deſtroy the facts, which prove that he made a bad uſe of his freedom.

If it is yet inſiſted, that this liberty ſhews at leaſt the judgment of his family reſpecting his ſituation, ſince they would not have allowed him it if they had thought him capable of committing the actions, which are ſtated by the witneſſes of the *Prince de Conty;* we ſay, in the ſecond place, as we ſaid yeſterday upon another occaſion, that the family was more to be commiſerated than blamed; and that we muſt hear their reaſons before we can

pronounce a ſolid judgment upon their conduct. Perhaps they would have told us, that if they had offered to put any conſtraint upon the *Abbé d'Orleans*, he would have fallen immediately into that declared fury, which took place a few months afterwards; that by leaving him maſter of his actions, they prolonged for ſome months the duration of that calm and tranquil folly, which was a ſmaller evil than a ſtate of fury; that perhaps they ſtill retained a hope of cure, which they muſt have abſolutely renounced, if they had placed any reſtraint upon his conduct; laſtly, that there were but two things to chuſe, the one to leave him at perfect liberty, the other to place him in abſolute confinement; the latter would have been the moſt ſimple; but, beſides that it might have appeared too harſh, and perſons heſitate a long while upon theſe occaſions, before they go to ſuch extremities; taking this part would not agree with the neceſſity which there was of making the *Abbé d'Orleans* execute the ſeveral acts, which were neceſſary for the good of the family. But why ſearch longer for conjectures and colours, when we find the truths themſelves written in the depoſitions of the witneſſes?

Recollect, if you pleaſe, every thing which we have already ſtated concerning the judgment of the family, and, above all, thoſe important reflections of the principal witneſſes of the *Prince de Conty*, which ſhew it to have been very plain, that they would have confined the *Abbé d'Orleans* during his ſtay at *Paris*, if the important affairs of the family had not obliged them to defer the execution of this deſign; there are ſome who go ſtill further, and who atteſt that *Madame de Longueville* told them, that ſhe was obliged to manage him, and ſupport him for the welfare of the family.

In ſo delicate a conjuncture, what could they do better than ſend him to travel under another name, with a ſmall number of choſen domeſtics, to bring him back the moment of his majority, for the purpoſe of tying his hands and ſecuring all his property to the *Comte de Saint Pol*; to make him ſet off immediately afterwards, and to flatter his volatility and inconſtancy by continual journies, until his reaſon ſhould be re-eſtabliſhed, or his inſanity, converted into fury, could not be reſtrained within any reaſonable bounds?

Such appear to have been their intentions; and, once more, was it eaſy to take a better part? Shall we repeat that cenſure is much more eaſy than counſel? But, under all theſe circumſtances, it is certain that the general fact of liberty can no longer be conſidered as deciſive.

Let us enter into the examination of particular facts. There are a great number, which are either indifferent or equivocal.

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Such are the ſermons, the exhortations which he made to the domeſtics. Upon this ſubject we have only to join the witneſſes of the *Prince de Conty*, with thoſe of *Madame de Nemours*, to find not a preſumption of reaſon, but a proof of madneſs.

Such is the fact of the viſits and exhortations to the patients in the *Hoſpital of Charity*. You have ſeen the circumſtances with which they were accompanied in the inqueſt of the *Prince de Conty*.

Such are the pious and Chriſtian converſations, of which ſome witneſſes ſpeak in general, without applying any of them in particular. Thoſe fragments of ſermons, which it is ſaid the *Pere Cheran* approved when they were recited to him by the *Abbé d'Orleans;* that Latin converſation which the vicar of a village ſaid that he admired; all theſe facts are vague, general, indefinite, ſuſceptible of all kinds of interpretations, according to their particular circumſtances, which are not at all ſtated by the witneſſes.

The deputation of *Chateaudun*, which the *Abbé d'Orleans* received in the cloiſter of the chartreux, is not a more deciſive fact than the preceding. The witneſs only ſhews, that he received it with chagrin, and that he ſent his officers to the almoner, and continued the converſation which he had begun with a chartreux. What is there in this which is to efface the ſuſpicions of inſanity? It is of the ſame kind with that other fact which has been brought forward with ſo much anxiety, that the *Abbé d'Orleans*, attentive to the rank which he derived from his birth, always took precedence of the *Biſhop of Angers*. Does this fact prove any thing elſe, than that the habits naturally contracted from his infancy, were not at all times obliterated from his memory? Let us add, that another fact, upon which they dwelt a long time, is not leſs indifferent than thoſe which we have already mentioned. It is that related by the *Sieur David*, who ſays, that the *Abbé d'Orleans* kept his table, and that ſeveral perſons of diſtinction dined with him.

But this took place very ſeldom, ſince we learn from the witneſſes of the *Prince de Conty*, that the moſt miſerable pot-houſes were the places which the *Abbé d'Orleans* commonly choſe for taking his repaſts.

Even ſuppoſing he had frequently eaten at the *Hotel de Longueville*, what concluſion could be drawn from it? Has it ever been contended, or could it be contended on the part of the *Prince de Conty*, that becauſe the *Abbé d'Orleans* was in a ſtate of inſanity, he could never take his meals at his own houſe? Who are the perſons of diſtinction referred to? Only one is mentioned, which is the *Sieur Arnauld*. Every body knows that *Madame de Longueville* honoured him with her particular eſteem and confidence, and even

when the *Abbé d'Orleans* was placed in confinement, he was not concealed from a perſon of the character mentioned by the witneſſes.

What remains then if we take off all the uſeleſs facts in the inqueſt of *Madame de Nemours?* Two principal facts.

The one regards his eccleſiaſtical functions, the other the honour which he had of taking leave of the *King* before he left *Paris*, after making his laſt teſtament.

Let us begin with the eccleſiaſtical functions.

Let us, in the firſt place, take off all the facts which took place on the miſſion to *Saint Marie aux Mines.*

A crowd of reaſons preſent themſelves to defeat the authority of the witneſſes, who ſpeak of it, and the circumſtances which they relate.

In the firſt place, theſe facts have not received, or rather they could not receive any legitimate contradictions in the inqueſt of the *Prince de Conty.* Within what ſpace of time is his proof confined, both by the original ſentence, and the judgment which confirmed it? To ſix months preceding the teſtament which he oppoſed. Provided he has proved, that in thoſe ſix months, and principally at the very time of making the teſtament, the *Abbé d'Orleans* was in a ſtate of perfect and notorious inſanity; he has ſatisfied all that your judgment required from him; he could not prove any thing more; and if *Madame de Nemours* wiſhed to prove the ſanity of the *Abbé d'Orleans* ſix months after his teſtament, ſhe ought to have articled that fact, as the foundation of a ſolid induction againſt the proof of the *Prince de Conty.* It is here ſuppoſed, on the part of *Madame de Nemours*, that the *Prince de Conty* had put it in iſſue, that the commencement of the inſanity was ſix months previous to the time of the teſtament, and that on the other ſide, *Madame de Nemours* had articled, that the inſanity did not commence till ſix months after the teſtament. If that had been the caſe, a great advantage might have been derived from the witneſſes of *Saint Marie aux Mines*, becauſe their depoſition would have been entirely conformable to the oppoſite facts alleged by the reſpective parties; but it is not in that manner, that the facts have been alleged in the articles; it is not true, that each of the parties have alleged different facts on their reſpective ſides. The *Prince de Conty* has exhibited his articles, and what is the fact which he alleges? It is, that the inſanity had commenced ſix months before the teſtament. *Madame de Nemours* has not propoſed any oppoſite fact, ſhe has confined herſelf to a mere negative; and if you have permitted the witneſſes to be examined, it was not in compliance with her demand, for ſhe had not made any; but to ſatisfy the

diſpoſition

diſpoſition of the ordonnance, which requires that the proofs ſhall be always reciprocal on civil queſtions, and in fact, why has ſhe examined the witneſſes of *Saint Marie aux Mines?* Is it to prove, that the inſanity only commenced at the end of *September* 1671? but this fact was never alleged by any memorial, it is only to deſtroy the proof of the *Prince de Conty*, by a negative argument, and to conclude, that the *Abbé d'Orleans* was not inſane in the month of *February* 1671, ſince he was in a ſtate of ſanity in the *September* following. But this inference loſes all its force the inſtant it is remembered, that it was not alleged at the time of the interlocutory proceeding, and that conſequently the *Prince de Conty* could not be required to combat by his witneſſes, a fact of which he might well be ignorant, becauſe it was without the limits of the time to which his proof was to be confined.

If he could have examined witneſſes upon theſe facts, perhaps he might have deſtroyed them in an invincible manner; perhaps he might have ſhewn, that theſe eccleſiaſtical functions, which are now ſo much relied upon, were like the others, an effect, a conſequence, a proof of the inſanity of the *Abbé d'Orleans*; perhaps he would have ſhewn that he had committed indecent actions, like thoſe mentioned in his own inqueſt; and do we require any other proofs to be perſuaded of it, than thoſe which are derived from the witneſſes of *Madame de Nemours* herſelf, who could not help letting drop ſome traits of the character of the *Abbé d'Orleans?* We learn from one of them, that he went out in his ſurplice in the portal of the church, and that he there called to the perſons who were paſſing by, to come and confeſs to him; and what might we not expect from the witneſſes of the *Prince de Conty*, when even thoſe of *Madame de Nemours*, who once more had not in this reſpect, and could not have any legitimate cenſor, cannot but raiſe doubts and excite ſuſpicions?

But let us go further, and obſerve, that theſe witneſſes of *Saint Marie aux Mines* can prove nothing, becauſe they prove too much; for if we believe them, we muſt be perſuaded that the *Abbé d'Orleans* was much more reaſonable at the eve, and almoſt in the very arms of his fury, than at the moſt diſtant period, ſince we do not ſee him in his confeſſions fall into the ſame irregularities which the witneſſes of *Nantes* impute to him, in a manner ſo preciſe and uniform. And this is not all, for we muſt believe that *Madame de Longueville*, who before the journey of the *River Loire*, who before all the actions of inſanity, which the *Abbé d'Orleans* committed upon that journey, and during his ſtay at *Paris*, had nevertheleſs given directions to his almoner to prevent his getting permiſſions to take confeſſion; that notwithſtanding all theſe new

facts, notwithſtanding the rapid and continual augmentation of the inſanity, *Madame de Longueville* had the weakneſs to ſhut her eyes upon the ſituation of her ſon, and to leave him in poſſeſſion of a liberty which he never merited, and of which his laſt actions rendered him abſolutely unworthy.

What then was the cauſe of this complete liberty, of performing all kinds of eccleſiaſtical functions at *Saint Marie aux Mines*, which the *Abbé d'Orleans* enjoyed for the ſpace of ſix days? The cauſe is not difficult to be gueſſed at; the diſtance from *Paris*, the ſplendour of his name, which dazzled the people there, and made them admire as an exceſs of zeal, what was only the effect of a blind impetuoſity; the abſence of an almoner and of *Gaſtines*, whom *Madame de Longueville* had particularly charged with preventing her ſon from ſaying maſs; the impoſſibility which the other officers found of confining him within the bounds of reaſon, and the fear they might have of probably precipitating what at laſt was only, deferred for a few days, that is to ſay, the neceſſity of putting him into confinement.

Let us make another obſervation upon theſe facts. What preceded them, and what followed them? What preceded them you know; it is written in the depoſitions for the *Prince de Conty*; you know what *Gaſtines* and *Follard* have ſtated of the conduct of the *Abbé d'Orleans* at *Lyons*, and in *Provence*. The ſcandal which he cauſed at *Lyons*, by his indecencies even in the confeſſional, the adventure of the three beggars, from one of whom he wiſhed to draw a tooth; the irreverence, the trouble, the agitation with which he ſaid the maſs, at *Iſtre* in *Provence*, forgetting the greater part of the prayers, and leaving the perſon who ſerved him in doubt whether he had performed the act of conſecration. Laſtly, that ſtate of folly, which was ſo conſpicuous, that they were obliged to make him take off the ſacerdotal veſtments, when he went out of the ſacriſty; and many other circumſtances, which we do not repeat. Such are the facts which preceded the miſſion; but what followed it was a declared fury, as *Madame de Nemours* herſelf admits; and who can conceive that this miſſion, placed in the midſt of ſo many acts of fury, could have been ſo reaſonable as the witneſſes would perſuade you?

But what completely deſtroys all their credit, is, that *Madame de Nemours* herſelf appears in oppoſition to their teſtimony, and is obliged to contradict them by her written evidence, and her other witneſſes. What ſays that memorial of *Madame de Longueville*, which *Madame de Nemours* would have you ſo ſtrictly adhere to in fixing the preciſe epocha of the inſanity? She ſhews, according to the ſenſe of *Madame de Nemours* herſelf, that the *Abbé d'Orleans* was

was reduced to this ſad condition, ſeven or eight months after his majority. This expreſſion cannot be extended beyond the end of the eighth month, and that finiſhed on the 12th of *September*, and it was preciſely on that day, that the miſſion of *Saint Marie aux Mines* commenced; thus this miſſion, according to the literal application of the memorial of *Madame de Longueville*, and giving it the utmoſt poſſible latitude, is wholly included in the period of the inſanity.

Let us alſo ſee that *Perny*, one of the principal witneſſes, or rather the only important witneſs of *Madame de Nemours*, if he was not exceptionable, informs us that it was in the courſe of the miſſion of *Saint Marie aux Mines*, that the *Abbé d'Orleans* fell into the firſt tranſports of fury, with which he was attacked, and yet not one of the 25 witneſſes of this place would allow us to entertain the ſlighteſt ſuſpicion of infirmity or weakneſs of mind. They all repreſent the *Abbé d'Orleans* as a *Saint*, an *Apoſtle* of *Germany*, full of a pure and rational zeal, in the whole courſe of this miſſion. There are even witneſſes of *Madame de Nemours*, who go ſtill further, and who, contrary to the memorial of *Madame de Longueville* againſt the depoſition of *Perny*, atteſt the ſanity of the *Abbé d'Orleans*, even at *Sarrebourg*, where he did not go till ſome days after the miſſion of *Saint Marie aux Mines*.

Judge, Sirs, of the credit that ought to be given to the witneſſes, who neither agree with the pretended proofs in writing of *Madame de Nemours*, nor with the depoſition of her principal witneſs; who place wiſdom in the midſt, in the very boſom of madneſs; who, by proving ſo much, prove nothing; and who, not having any legitimate contradictor, have fallen into the ſame licentiouſneſs in the matter of their depoſitions, in which the abſence of an almoner had thrown the *Abbé d'Orleans*, in regard to his eccleſiaſtical functions.

Let us confine ourſeves then to the witneſſes who have depoſed to the time allowed by the former judgment.

We find three kinds of functions proved by the depoſitions of a great number of witneſſes, ſeveral of whom add, that the *Abbé d'Orleans* filled them in a very ſenſible manner.

The firſt and moſt important is that of prieſt, the ſecond that of deacon, the third that of mere clerk, in the aſſiſtance and celebration of divine ſervice.

It would be uſeleſs to enlarge upon the importance and weight of theſe facts, and particularly of the grand fact of the celebration of the maſs. That is in truth all that can form a real difficulty in this cauſe; without that we venture to ſay, that it would hardly appear ſuſceptible of any. All the other facts are uſeleſs, indif-

ferent, equivocal, frequently more approaching to infanity than to reaſon. This one ſeems at once eſſential, poſitive, capable of balancing all thoſe that are ſtated by the witneſſes of the *Prince de Conty*; it has that character of perſonality which we mentioned yeſterday; it is one of thoſe actions proper to the perſon doing them, more ſtrong than the ſignature of the greateſt number of acts, and which being once proved ſeems entirely to exclude the leaſt ſuſpicion of weakneſs of intellect.

Yet it has been oppoſed by ſuch powerful anſwers, that we do not think that this grand affair can be in all its circumſtances regarded as deciſive, ſince it is, on the contrary, from this very fact, that they offer to deduce the principal proofs of infanity.

Let us examine the propoſitions which reſult from it.

To decide upon their force we muſt diſtinguiſh two that require to be examined ſeparately.

The one is derived from the action itſelf. Can we be perſuaded that a perſon who was capable of exerciſing this venerable myſtery of offering the auguſt ſacrifice, which is the ſummary of our religion, that this ſame man had not ſufficient will, or ſufficient power, for the making a teſtament?

The ſecond preſumption is drawn from extrinſic circumſtances, and eſpecially from the ſilence and forbearance of the illuſtrious relations of the *Abbé d'Orleans*. Who can believe that *Madame de Longueville* would have authorized, by a mean compliance, a multitude of ſacrileges and profanations? for ſuch is the celebration of the maſs by a madman.

Let us anſwer to the firſt preſumption, as we have already done to that which is drawn from the entire liberty allowed to the *Abbé d'Orleans*; and let us ſay in a word, that to perform a reaſonable action in a reaſonable manner, is a great proof and almoſt a certain ſign of the poſſeſſion of a reaſonable mind; but to do an act of reaſon in a manner full of extravagance, is to furniſh the moſt irreſiſtible teſtimony of madneſs.

To be free, and to uſe that liberty wiſely, is to be wiſe; but only to be ſo in order to abuſe ſuch freedom, is the reverſe. Let us ſay the ſame as to the fact before us. To celebrate the maſs, with the gravity, with the application, the collected mind, which ſo ſacred an action requires, is to give the public a ſtriking proof of reaſon; but to celebrate the maſs with agitation, with trouble, with irreverence, to accompany it with actions unworthy not only of a prieſt, but of the loweſt degree of human reaſon, to profane the miniſtry by ſcandalous indecencies, is the height, the laſt degree to which a folly exempt from fury can attain; yet this is what occurred to the *Abbé d'Orleans*.

It

It is not neceſſary here to recal to your recollection the facts which have been ſtated, that precipitation, that general irreverence which is ſpoken of by the witneſſes, that leaping over the baluſtrade of the altar, at the time when he was preparing to receive the moſt auguſt of ſacraments; that diſcourſe which imbecility alone can render credible, as it alone can excuſe, we ſpeak of that order given in ſaying *Ite miſſa eſt;* to put a ſteak upon the gridiron; that other adventure ſo affecting to *Madame de Longueville;* laſtly that ſad neceſſity to which the almoner of *Madame de Longueville* was reduced, when he obliged the *Abbé d'Orleans* to deſcend from the altar between the epiſtle and the goſpel.

All theſe facts are preſent to your minds, and are ſufficient to efface whatever preſumptions can be drawn from the celebration of the maſs.

And in fact, Sirs, what could we expect from a man, who fell into ſuch exceſſes as have been related of the *Abbé d'Orleans?* Let us not divide thoſe eccleſiaſtical functions, which their unity ſhould render inſeparable. How could a man, who was under the impulſe of a real fury in reſpect to confeſſions, (we do not repeat the proofs) be in a condition to celebrate the maſs with diſcretion? How could it be hoped that he would diſcharge this miniſtry with reaſon, after all the proofs of inſanity which he had given, in his preachings, and in every thing which had reference to his eccleſiaſtical functions? Could he have been deranged in all the reſt and reaſonable only in this? Even if it was ſo, as there are ſome madmen who ſhew conſiderable ſenſe upon particular ſubjects, could this fact deſtroy the proof of all the reſt?

But no, Sirs, it does not deſtroy it; on the contrary it confirms it, and gives it full conviction. So far are the dignity and the ſanctity of the action from juſtifying the ſanity of the *Abbé d'Orleans*, that they on the contrary place his inſanity in its very ſtrongeſt point of view. To what exceſs of madneſs muſt he have arrived, when neither the majeſty of the altars, nor the fear of God, before whom even the angels are as nothing, nor the dignity of the ceremony, nor the concourſe of people, could fix the levity, the caprice, the abſurd emotions of his mind? And if an ancient conceived himſelf to mark all the crimes of thoſe who did not reſpect the ſanctity of the temples, when he ſaid *Alii in capitolio fallunt, ac fulminantem pejerant Jovem;* what can be ſufficient to ſhew the extreme inſenſibility of a man who commits actions of inſanity in the face of the altars, and at the very time when, as a miniſter of religion, he is ready to offer to the true God the only ſacrifice worthy of his acceptance?

It is true that they have not proved that theſe glaring actions of folly occurred to the *Abbé d'Orleans*, whenever he caught an opportunity of celebrating maſs; but is it neceſſary to ſhew that he committed every day prodigies of derangement, in order to ſupply melancholy proofs of his ordinary and habitual ſituation? Is it not ſufficient if even in the celebration of the maſs, he ſhewed ſome of thoſe indubitable ſigns of folly, in order to warrant the general concluſion, that he was in a ſtate of real inſanity; ſince it is viſible that a reaſonable man can never fall into ſuch extravagancies, and that no man who does fall into them can juſtly eſcape the imputation of folly and loſs of underſtanding?

If it is aſked how it happened, that upon ſome occaſions no public and viſible mark of inſanity eſcaped him? we ſhall anſwer, that nothing is more common than to ſee inſane perſons perform reaſonable actions, eſpecially when they are influenced by a particular paſſion for ſome kind of action; becauſe the ſame folly which inſpires them with the general deſign to commit ſuch action, alſo gives them an idea of performing it with all its exterior perfection, and without omitting any of the circumſtances which they conſider as neceſſary to it. We are not called upon to enter into the interior of the ſoul, ſtill leſs to penetrate, by an adventurous curioſity, into queſtions which are infinitely beyond the reach of our feeble underſtandings, to know whether the *Abbé d'Orleans* had a ſufficient power of mind, and what degree is ſufficient in the adminiſtration of the maſs. It is with reluctance that we have ſuffered an argument, upon which we think that we neither could nor ought to enter into an examination. There are ſome truths which we ought to honour by our ſilence, or at leaſt, which we muſt ſubmit to the biſhops, and other depoſitaries of tradition; contenting ourſelves with the humble and ſincere confeſſion of our ignorance, upon every thing which relates to the inward diſpoſitions of other perſons. And in fact this is what can only be known by God. All that the witneſſes have related only regards the exterior actions. Now this exterior might, at certain times, be ſufficiently regular in the *Abbé d'Orleans*, without eſtabliſhing a certain proof of ſanity. It is even poſſible that the witneſſes who ſpeak of it, may neither have been capable, nor ſufficiently attentive, to judge of this exterior regularity; and this is even very probable when we examine the quality of thoſe who relate the fact, and who are ſome of the inferior domeſtics of the *Houſe de Longueville*.

But without entering into this diſcuſſion, let us reſt upon this grand reflection which appears to us ſufficient. The celebration of the maſs with wiſdom, is one of the ſtrongeſt preſumptions of the

the ſound and regulated diſpoſition of the prieſt who celebrates it; but the maſs ſaid with irreverence, interrupted with ſcandal, and profaned by indecencies, which it is even painful to mention, is the very ſtrongeſt proof of inſanity.

But if that is true, as nobody can doubt, how are we to explain the patience of the family of the *Abbé d'Orleans?* This is the ſecond preſumption which reſults from the fact of the maſs, and which, although it appears at firſt entirely deciſive, is however not more ſtrong than the firſt, when it comes to be examined; on the contrary, we may ſay that it is deſtroyed, in a manner ſtill more invincible.

Let us diſtinguiſh, upon this point, two periods in the life of the *Abbé d'Orleans*. The firſt, that which preceded the important and deciſive fact of this cauſe; that is the fact of which *Madame de Longueville* was herſelf a witneſs. The ſecond, including the time which followed it.

Up to that time *Madame de Longueville* doubted of her calamity, ſhe ſtill flattered herſelf by indulging a hope of cure; ſhe was, it is true, even more exalted by the ſanctity of her life, than by her birth; but ſhe was a mother, and ſhe thought perhaps that it would not be poſſible to keep her ſon in a ſtate of continual dependance, and he was ſometimes allowed to act without any ſuperintendant of his conduct. Yet although there was ſtill ſome doubt and ſome uncertanty in her mind, ſhe from that time took every precaution to prevent the *Abbé d'Orleans* from being admitted to the celebration of maſs. We learn from ſeveral witneſſes, that ſhe ſent to give notice to the ſuperiors of the church not to admit her ſon to ſo ſacred a miniſtry; but it muſt be allowed that theſe intimations had not any great effect, and the *Abbé d'Orleans* ſtill found too many opportunities of exerciſing the ſacerdotal functions. We muſt even admit that it does not appear, that during the journey of *Orleans*, *Madame de Longueville* charged his almoner to prevent his ſaying maſs, as ſhe had charged him with preventing his receiving confeſſions; therefore it ſeems very probable, that it was not until the return from that journey, that *Madame de Longueville*, finding the weakneſs of the *Abbé d'Orleans* conſiderably increaſed, took more effectual precautions to prevent his ſaying maſs.

But after that adventure which ſhe ſaw with her own eyes, ſhe no longer took any meaſures; *Madame de Billy*, the *Sieur Gaſtines*, and ſome other witneſſes apprize us that ſhe abſolutely forbade her ſon being allowed to ſay maſs, and if he ſaid it afterwards, the ſame witneſſes inform us, that it was by ſurprize, without the knowledge of *Madame de Longueville*, and by the unfortunate

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colluſion of *Porquier*, who was afterwards the depoſitary of his teſtament.

We ſhall not enlarge upon the functions of deacon which he exerciſed only twice in the two months next adjoining to the teſtament, one of which was at the inſtitution, where his madneſs was not known, and the joy of performing this function prevented its appearing at that moment. We ſhall not ſpeak of the functions of clerk, which he does not appear to have exerciſed within the time to which the proof is confined.

The fact of the *Abbé d'Orleans* having taken leave of the king, is only proved by a rumour which took place at the *Hotel de Longueville*, and beſides it amounts to no more than a mere matter of ceremony, which he might be ſuppoſed capable of performing at a time when his folly was as yet fearful and docile.

But after having ſhewn you, that there never was a proof more certain and convincing than that which ariſes from the inqueſt of the *Prince de Conty*; after having ſhewn you that it is not deſtroyed by that of *Madame de Nemours*, but on the contrary, confirmed in ſeveral particulars; it only remains very ſhortly to diſcuſs the laſt queſtion of this cauſe. The firſt queſtion was, whether the inſanity was proved? the ſecond is, whether it was continual, or ſuſceptible of lucid intervals, in which it might be preſumed that the teſtament was made?

In reſpect to the law, there are three objects upon which we ſhall make very ſummary reflections.

1. What is a lucid interval, and whether there is any ground for confounding it with an action of apparent reaſon?

2. In what kind of folly the law preſumes ſuch intervals?

3. In what manner it ought to be proved?

Let us follow theſe reflections, and examine firſt, what it is that the juriſts call a lucid interval.

Two conditions diſcover the real idea of it.

The firſt, is the nature of the interval; the ſecond, its duration—*its nature*—It muſt not be a ſuperficial tranquillity, a ſhadow of repoſe, but on the contrary, a profound tranquillity, a real repoſe; it muſt be not a mere ray of reaſon, which only makes its abſence more apparent when it is gone, not a flaſh of lightning, which pierces through the darkneſs only to render it more gloomy and diſmal, not a glimmering which unites the night to the day; but a perfect light, a lively and continued luſtre, a full and entire day, interpoſed between the two ſeparate nights, of the fury which precedes and follows it; and, to uſe another image, it is not a deceitful and faithleſs ſtillneſs, which follows or forebodes a ſtorm, but a ſure and ſteadfaſt tranquillity for a time, a real calm, a perfect

fect ſerenity, in fine, without looking for ſo many metaphors to repreſent our idea, it muſt be not a mere diminution, a remiſſion of the complaint, but a kind of temporary cure, an intermiſſion ſo clearly marked, as in every reſpect to reſemble the reſtoration of health. So much for its *nature*.

And as it is impoſſible to judge in a moment of the quality of an interval, it is requiſite that there ſhould be a ſufficient length of time, for giving a perfect aſſurance of the temporary re-eſtabliſhment of reaſon, which it is not poſſible to define in general, and which depends upon the different kinds of fury, but it is certain there muſt be a time, and a conſiderable time. So much for its *duration*.

Theſe reflections are not only written by the hand of nature in the mind of all men, the law alſo adds its characters, in order to engrave them more profoundly in the heart of the judges. There are two important laws upon this ſubject: 1. The law 18. § 1. *ff. L.* 41. *Tit.* 2. *de acq. vel. amit. poſſ.*(*a*). It ſuppoſes the caſe of a perſon in a ſtate of fury, who appears reaſonable, who contracts, who acquires, who takes poſſeſſion; his folly is ſo concealed that the vendor is abſolutely deceived, and yet ſo certain that the juriſt decides; he does not acquire the poſſeſſion. What terms does he make uſe of to mark this condition, *in conſpectu inumbratæ quietis*; and in what does the ſhadow of repoſe conſiſt? in the two conditions which we have marked, *its nature*; this is only an exterior tranquillity; if they had paſſed this firſt ſurface, if they had entered into the ſanctuary of reaſon, they would have found him under the actual ſlavery of his fury, which was only in a ſtate of tranſitory ſlumber; *its duration*, it is only a moment, which paſſes *in conſpectu*; it is nothing but a glance, a fleeting light, a ſhort and rapid view. 2. The law 6. *cod. L.* 5. *Tit.* 70. (*b*). *de curatore furioſi*, &c. de-

(*a*) Si furioſo, quem ſuæ mentis eſſe exiſtimas, eo quod forte in conſpectu inumbratæ quietis fuit conſtitutus, rem tradideris: licet ille non erit adeptus poſſeſſionem, ut poſſidere deſinis, ſufficit quippe dimittere poſſeſſionem, etiam ſi non transferas. Illud enim ridiculum eſt, dicere, quod non aliter vult quis dimittere, quam ſi transferat: imo vult dimittere, quia exiſtimat ſe transferre.

(*b*) Cum aliis quidem hominibus continuum furioſis infortunium accidat, alio autem moribus non ſine laxamento aggrediatur, ſed in quibuſdam temporibus quædam eis intermiſſio perveniat, et in hoc ipſo multa ſit differentia, ut quibuſdam breves induciæ, aliis majores ab hujuſmodi vitio inducantur: antiquitas diſputabat, utrumne in mediis furoris intervallis permaneret eis curatoria interceſſio, an cum furore quieſcente finita, iterum morbo advenientе rediategraretur? Nos itaque ejus ambiguitatem decidentes, ſancimus (cum incertum eſt in hujuſmodi furioſis hominibus, quando reſipuerint, ſive ex longo, ſive ex propinquo ſpatio, et impoſſibile eſt, et in confinio furoris et ſanitatis eum ſæpius conſtitui, et poſt longum tempus ſub eadem eſſe varietate, ut in quibuſdam videatur etiam pene furor eſſe remotus) curatoris creationem non eſſe finiendam, ut in quibus dam videatur etiam pene furor eſſe remotus: ſed manere quidem eam donec talis furioſus vivit: quia non eſt pene tempus in quo hujuſmodi morbus deſperatur.

cides

But let us leave the expoſitors and proceed to the laws, they furniſh us with three arguments, two negative, and one poſitive.

Firſt negative Argument. They could not cite a ſingle law, which ſpeaks of intervals, with regard to thoſe who are *mente capti*; on the contrary, all the laws which ſpeak of them refer ſolely to perſons in a ſtate of fury.

Second negative Argument. We ſee that they admit furious perſons in their intervals even to the function of a judge. Law 39. *ff. de judiciis, L.* 5. *Tit.* 1. but was any thing of the kind ever heard of in caſe of a mere deſtitution of reaſon?

Third Argument, which is poſitive, and which forms a kind of demonſtration, derived from the law 25. *Code de nuptiis.*

It was ſome time before a queſtion, whether the children of perſons who fell into a ſtate of inſanity, were obliged to wait for their conſent to marry, and there is a progreſs in the law upon this queſtion. It was firſt decided only in favour of daughters.

Afterwards in favour both of ſons and daughters of a perſon who was *mente captus.*

With reſpect to the ſon of a furious perſon, the doubt continued until the time of *Juſtinian*, who decided, by the law which has been cited, that they ſhould alſo be allowed to marry without waiting for the conſent of the father; till then it ſeems to have been neceſſary to obtain a particular permiſſion, or to wait for a lucid interval.

Hence ariſe the invincible arguments.

Why ſhould they permit that to the ſon of a perſon *mente captus*, which was not allowed to the ſon *furioſi*, except that the law did not preſume there to be any intervals, in which the former could conſent, and did preſume them in regard to the latter? There is no other ground of difference. Then the preſumption of law is eſtabliſhed, not only by negative, but alſo by poſitive arguments.

Let us now aſcend to the higheſt degree, that is to reaſon, which is the ſource of theſe laws.

Two eſſential reaſons are the foundation of them.

1. The nature of mere inſanity, which being commonly the effect of temperament, is rather a weakneſs of organs, an habitual evil, than an accidental malady. It is otherwiſe with reſpect to fury, which may have a temporary cauſe, which is ſometimes cured and frequently ſuſpended; and, to make uſe of the elegant terms of the author of the factum, diſtributed by *Madame de Nemours*,

mours, in 1673. " Infirmity of mind, particularly when it is the " effect of temperament, is not cured by ſucceeding years; they " only ſerve to fortify the complaint, which may even be con- " ſidered incurable, being a privation which can never return to " being, and exiſtence." This was applied to the inſanity of the *Abbé d'Orleans*.

2. Even if nature may admit of intervals in a caſe of ſimple inſanity, (a queſtion which muſt be left to the profeſſors of medicine,) Juriſprudence cannot recognize them: for the grand rule is, *de his quæ non ſunt, et quæ non apparent, idem eſt judicium*.

We may obſerve the paroxyſms and the intervals of a furious perſon; how can we know the changes in an ideot which are almoſt imperceptible? This conſtitutes the very definition of inſanity, according to *Baldus*, *demens qui nullum extrinſecus oſtendit furorem, qui habet furorem latentem*. It lives, it nouriſhes itſelf within, and gives no ſigns without: for inſtance; thoſe who are only touched upon a ſingle ſubject, have the marks of underſtanding in every thing elſe. Now if we do not ſenſibly perceive the departure of reaſon, what indication can there be of its return?

Let us come to the third reflection, how ſhould intervals be proved, even in a caſe of fury?

Many expoſitors have thought that, *ſemel furioſus ſemper præſumitur furioſus*.

But there is a ſurer diſtinction.

Either they have not proved the fact of intervals, and then they are never preſumed, however reaſonable the act may be, unleſs it is in its nature entirely perſonal, and to this, the paſſage of *Bartolus*, which has been cited, muſt be reduced.

Or it is proved there were conſiderable intermiſſions, and then if the act is reaſonable, the preſumption will be for placing it at the time of the lucid intervals.

As to the fact, there are two points to examine, the one what is the kind of folly, the other, what proof there is of intervals.

Let us firſt ſee what is the kind of folly.

It certainly is not a ſtate of fury, except ſome momentary attacks which it was eaſy to ſtop in an inſtant. This is proved by the liberty which he enjoyed, and by the facts of the inqueſt. The witneſſes ſpeak of levity, agitation, ramblings, fooliſhneſs, laughing, incoherent diſcourſes, infantine conduct; the words *inſanity*, (*demence*,) and imbecility, are employed in the depoſition.

In the ſecond place, he was really in a ſtate of privation of reaſon, and imbecility, (*un inſenſé*, *un imbecille*,) of which there are two proofs in writing.

1. The ſentence of the council, where we ſee the expreſſion, weakneſs of mind.

2. The factum of *Madame de Nemours*, which ſays, that the *Abbé d'Orleans fell into a weakneſs of mind, or rather, as was too evident and too ſenſible to Madame de Nemours, into an entire imbecility.* Here you have the kind well characterized: let us add the expreſſions which we have already taken notice of; *an infirmity which is the effect of temperament, a privation which has never any return to being and exiſtence*, and elſewhere, *a continual inſanity without intermiſſion, without any proper intervals.*

Let us apply then the maxims of law to the circumſtances of fact. Intervals in this kind of inſanity are not preſumed.

The reaſons of the maxims are equally applicable with the maxims themſelves.

1. The nature of the infirmity (*mal*). We ſee plainly that it was an entire derangement of the organs, which are ſubſervient to operations of the mind, and not an accidental malady.

2. It is impoſſible to know when the infirmity ceaſed, and when it began. It was really ſimilar in ſome reſpects to thoſe which we have deſcribed, as a mind only affected in certain points. Who can doubt that his furious deſire of confeſſing was of this number, and, at the ſame time, who can doubt that, at whatever moment any body offered to confeſs to him, he would have accepted the propoſal with avidity? Then the folly always continued.

Let us next examine what proof there is of intervals, and as to that, let us look at what has been ſaid on the one ſide for *Madame de Nemours*, and on the other for the *Prince de Conty*.

With reſpect to *Madame de Nemours*, let us be ſatisfied with three obſervations.

The firſt, that ſhe never articled the fact of intervals; yet this could never be ſupplied.

The ſecond, that her witneſſes do not prove it; either becauſe they prove too much, and conſequently prove nothing; or becauſe they only ſpeak of particular actions, and thoſe actions are not intervals; and becauſe they did not ſee him for a ſufficient continuance, particularly at the time of the teſtament, when he was continually running out of the *Hotel de Longueville*, to be able to give an account of an interval ſufficiently long, to induce the preſumption of a real intermiſſion.

The third, that this proof ſhould apply to the time of the teſtament, which is not the caſe.

Let us conſider, on the other ſide, what has been eſtabliſhed by the *Prince de Conty*.

Wi

What does he prove by the depoſition of the witneſſes, whom he has examined?

1. Some of them ſhew the continual agitation of the *Abbé d'Orleans*; they repreſent him as always diſturbed, and without any moment of quiet and tranquillity.

2. Many of them expreſs the ſame thing in other terms, ſpeaking of a ſtate of *inſanity*, (*demence*,) of abſolute incapacity.

3. The ſucceſſion of actions in which we hardly ſee any pauſe, forms another proof of continuity.

At *Paris*, before the journey of *Orleans*, he ran about the ſtreets, jumped upon his ſhadow, vaulted over the baluſtrade of the altar, and that ſeveral times. At *Blois*, the fact of the caſſerolle, and that of the powder; at *Tours* he ran wildly about the ſtreets, the ſame at *Saumur*. He ſings in the ſtreets, makes ridiculous ſigns and benedictions in the church, at *Richlieu* the fauteuil, at *Angers* the funeral oration and the maſs. At *Nantes*, he runs the ſtreets as elſewhere, and ſhews a continual fury for taking confeſſions. At *Paris*, he hardly ever eats at the *Hotel de Longueville*. We ſee him inceſſantly in the ſtreets, the ſubject of ſeveral adventures. Where can we find the ſlighteſt interval?

Let us conclude by one reflection. It is very difficult in *France* to allow the fact of intervals.

The inconvenience of it, or rather of the interpretation which they wiſhed to give it in the *Roman* law, was ſenſibly experienced.

Every thing would be doubtful and arbitrary. The ſtate of men ought to be more ſimple. It is true that the ancient practicians, who thought they had done a great deal, when they tranſlated a *Roman* law into *French*, ſaid, that they found an exception in favour of theſe intervals. But *Mornac* has judged better when he ſays, *Servamus ex decretis curiæ irritum eſſe teſtamentum, quod a teſtatore habente luccida intervalla ſcriptum eſt.*

And in fact they have not been able to cite any caſe for *Madame de Nemours*, which has admitted and authorized the diſtinctions of intervals, to ſupport a teſtament made after the commencement of a ſtate of inſanity.

We ſhall not enter particularly into the appeal from the ſentence, which concerns the exception propoſed againſt *M. de Machault*: it will ſuffice to ſay, 1. That this appeal is uſeleſs, as you are now to pronounce upon that from the definitive ſentence; 2. That the exception was dilatory; 3. That the ground of it was an affected law ſuit.

(He here made a recapitulation which was not reduced into writing.)

Let us finally add two reflections, one, that there is no uniformity between the time of the firſt teſtament and the ſecond.

The other, that the conflict here is not between a teſtament and an heir by blood, whoſe only title is the law, but between two teſtaments; and if we combine all the circumſtances which we have already examined, it is impoſſible to doubt but that the firſt is the more favourable, and ought to outweigh the laſt in the ſcale of juſtice.

THE COURT, AFTER TAKING TIME TO DELIBERATE AND EXAMINE THE PROCEEDINGS, PRONOUNCED A JUDGMENT CONFORMABLY TO THE ABOVE OPINION, IN FAVOUR OF THE PRINCE DE CONTY.

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THE END.

Printed by A. Strahan, Law Printer to His Majeſty,
Printers-Street, London.

ERRATA.

VOL. II.

Page.	Par.	Line.	
40	4	5	For *executing* read *exceeding*.
45	1	3	For *a perſonal* read *an entire*.
61	3	8	Dele *and even where there are more than two*.
64			Note, Line 10, for *exempts* read *protects*.
109	1	19	Dele the ſemicolon.
143			Note, Line 2, for *their* read *its*.
144			Note, Line 5, 6. 7.—The words from *Now* to *not ſo* inclusive, to be tranſpoſed to the end of the note.
159	4	13	After *meaned* read *was*.
176	4	7	Dele *as*.
185	2	6, 7	Tranſpoſe the words *perſon, witneſs*.
214	3	9	For *conteſt* read *contract*.
217	2	7	For *information* read *confirmation*.
218	3	2	For *excluſive* read *exceſſive*.
220	3	7	Dele *in*.
224	2	5	Dele *neceſſary*.
239	2	2	Dele *at the time of writing the ſentence*, for *grander* read *grand*.
240	1	7	For *form* read *point*.
245	1	7	For *firm* read *ſtrong*.
		22	After *frequently* read *to be*.
247	2	18	Dele *alr eady alluded to*.
255	1	18	Dele *which*.
259	2	29	For *incuce* read *incline*.
261	1	38	For *diſcontinuance* read *diſcountenance*.
262	2	4	For *concerned* read *concurring*.
263	1	27	For *any, in*, read *in any*.
266	1	4	For *objection* read *queſtion*.
268	1	33	For *repreſſed* read *ſuppreſſed*.
269	2	4	For *them immediately* read *their immateriality*.
277	1	16	After *cure* read *all*
287	2	19	For *I have known evidence* read *evidence was*.
	3	4	Dele *properly*.
293	3	21	For *degrees* read *degree*.
		28	For *is* read *are*.
373	4	11	For *Maximilian* read *Maximian*.
374	1	11	Dele *the*
		21	Dele *an*.
376	2	7	For *diſtaſt* read *diſtant*.
		8	For *upon* read *from*.
387	1	26, 28	For *drawer* read *payee*.
392	2	27	For *quam* read *quam*.
402	1	4	For *by* read *of*
	3	5	For *From* read *If from*.
403	1	11	For *accident* read *conduct*.
		24	For *therefore* read *thereof*.
	2	28	For *one* read *caſe*.

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